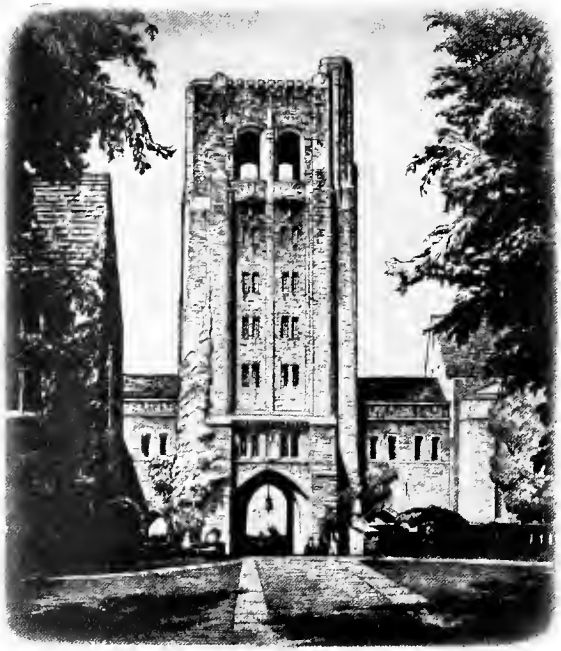

A TREATISE

ON THE

LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH

ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN AND OTHER LEGAL SYSTEMS

BY

HIS HONOUR THE LATE JUDGE PITT TAYLOR.

ELEVENTH EDITION

BY

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Longum iter est per præcepta,
Breve et efficax per exempla.—SENECA.

IN TWO VOLUMES.

VOL. II.

LONDON:
SWEET & MAXWELL, LIMITED,
3 CHANCERY LANE, W.C. 2.
1920.

PRINTED BY
THE EASTERN PRESS, LIMITED,
LONDON AND READING.

CONTINUATION OF PART II.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.

CHAPTER XVIII.

MATTERS REQUIRING TO BE EVIDENCED BY WRITINGS.

§ 972. In the present chapter will be considered briefly those matters, for the proof of which the law requires a *written document* more or less formally executed. Writings are of two kinds, namely, (1) writings under seal, which are called "*deeds*," and (2) ordinary writings not under seal.

§ 973. First, as to those transactions which, at common law, are required to be evidenced by deed. The most important of these relate to *incorporeal rights*; and it is now clearly determined, that all such rights, whether they amount to an interest in land or not, lie in grant, and as such can neither be created, assigned, demised, nor surrendered, except by deed (*a*). The term "incorporeal rights" includes among other things advowsons, ferries (*b*), rents, interests in lands not in possession, as remainders, or reversions for life or years, profits *à prendre*, easements, and the like; and the principle, which requires such rights to be evidenced by documents under seal, does not depend on the quality or amount of interest granted, transferred, or surrendered, but on the nature of the subject-matter; a right of common, for instance, which is a profit *à prendre*, or a right of way, which is an easement or right in nature of an easement, can no more

(*a*) *Wood* v. *Leadbitter*, (1845) 13 M. & W. 842; 14 L. J. Ex. 161; 67 R. R. 831; *Hewlins* v. *Shippam*, (1826) 5 B. & C. 229; 4 L. J. (O.S.) K. B. 241; 31 R. R. 757; Co. Lit. 337 b. 338 a.; 2 Shep. Touch. 300; *Lyon* v. *Reed*, (1844) 13 M. & W. 303; 13 L. J. Ex. 377; 67 R. R. 593; *Bird* v. *Higginson*, (1837) 2 A. & E. 696; 6 A. & E. 824; 6 L. J. Ex. 282; *Mayfield* v. *Robinson*, (1845) 7 Q. B. 486; 14 L. J. Q. B. 265; *Roffey* v. *Henderson*, (1851) 17 Q. B. 574. The better opinion is that the cancellation or destruction of the deed will *not* draw after it the loss of the interest itself, even where it is one which is necessarily in writing. See Greenleaf on Ev. 15th ed. (1892), §§ 265 and 568.

(*b*) *Mayfield* v. *Robinson*, (1845) 7 Q. B. 486.

be granted or conveyed for life or for years or even for days without a deed, than in fee-simple (*c*).

So strict is this rule that previous to 1914 it was generally understood that even a ticket of admission to a theatre or to a grand-stand during the races, afforded no irrevocable title to the party purchasing it; who, after notice of revocation, could be removed by the owner of the premises, without assigning any reason; and his only remedy, if any, was to bring an action, founded on a breach of contract, against the person who sold the ticket (*d*). But, since *Hurst* v. *Picture Theatres, Lim.* (*e*), this view of the law must be considered to be erroneous. In that case it was held that the purchaser of a ticket for a seat at a theatre or other similar entertainment has a right to stay and witness the whole of the performance, provided that he behaves properly and does nothing to justify his expulsion, and if requested to leave the theatre may decline to do so, and may maintain an action for assault and recover vindictive damages if he is forcibly ejected. A mere personal licence of pleasure, as the privilege of hunting, will be revocable, whether granted by parol, or under seal (*f*), but the privileges of hunting, fishing, or shooting, if coupled with a right of taking away the game when killed, will be profits *à prendre*, and as such can only be irrevocably granted by deed (*g*).

§ 974. Although a parol demise of an incorporeal hereditament passes no estate, it by no means follows that the party who actually occupies and enjoys the thing so demised, is protected from all liability to pay for his occupation and enjoyment; and the grantor will be entitled to recover from the grantee, for use and occupation, such reasonable sum as the jury shall assess, for the actual enjoyment of the hereditament demised (*h*). So, too, the grantee of a licence granted for valuable consideration may be entitled to damages for breach of contract for the revocation of such licence, if such revocation is a breach of contract, and even if the grantor of such a licence

(*c*) *Wood* v. *Leadbitter, supra.* See *Williams* v. *Morris*, (1841) 8 M. & W. 488; 11 L. J. Ex. 126; *Perry* v. *Fitzhowe*, (1846) 8 Q. B. 757; 15 L. J. Q. B. 239; 70 R. R. 626.

(*d*) *Wood* v. *Leadbitter, supra*, overruling *Taylor* v. *Waters*, (1817) 7 Taunt. 374; 18 R. R. 499, and explaining *Webb* v. *Paternoster*, (1620) Palm. 71; *Kerrison* v. *Smith*, [1897] 2 Q. B. 445; 66 L. J. Q. B. 762; *Wood* v. *Lake*, (1751) Say. 3; and *Wood* v. *Manley*, (1839) 11 A. & E. 34; 9 L. J. Q. B. 27; 52 R. R. 271. See also *Taplin* v. *Florence*, (1851) 10 C. B. 744; 20 L. J. C. P. 137; 84 R. R. 773.

(*e*) [1915] 1 K. B. 1; 83 L. J. K. B. 1837.

(*f*) *Wood* v. *Leadbitter, supra; Wickham* v. *Hawker*, (1840) 7 M. & W. 79; 10 L. J. Ex. 153; 56 R. R. 623; *Thomas* v. *Sorrell*, Vaugh. 351. And see *Guyot* v. *Thomson*, [1894] 3 Ch. 388; 64 L. J. Ch. 32.

(*g*) *Doe* v. *Lock*, (1835) 2 A. & E. 705; *Wickham* v. *Hawker, supra*, recognised in *Durham and Sunderland Ry.* v. *Walker*, (1842) 2 Q. B. 967; 57 R. R. 842; *Bird* v. *Higginson, supra; Barker* v. *Davis*, (1864) 34 L. J. M. C. 140; 146 R. R. 812.

(*h*) *Bird* v. *Higginson, supra; Thomas* v. *Fredericks*, (1847) 10 Q. B. 775; 16 L. J. Q. B. 393; 74 R. R. 502. See *post*, §§ 981-984, 1036, 1043.

is entitled to revoke it the licensee may be entitled to reasonable notice of revocation, and may be entitled to damages if such licence is revoked without such reasonable notice being given (*i*). In this connection it is to be observed that since the Judicature Acts the revocability of a licence given for valuable consideration must be considered not exclusively by reference to common law doctrines, but by reference to the equity authorities, for any case in which, before the Judicature Acts, a court of equity would have restrained the grantor of a licence from revoking same, such licence must now be treated as irrevocable at law also, so as to entitle the grantee to recover damages for the attempted revocation (*k*).

§ 975. With respect to the transfer of personal property the law appears to be as follows:—A *donatio mortis causâ*—which, by the way, must be clearly (*l*) proved to have been given in contemplation of death (*m*)—passes no property to the donee without delivery (*n*); and it is immaterial whether at the time of the gift the chattel be in the actual possession of the donor or of the donee (*o*). The gift of a chattel *inter vivos*, whether made verbally or in writing without deed, is not binding, unless there be either an actual transfer of the property (*p*), or a declaration of trust respecting it (*q*); neither will the courts substitute one of these modes of dealing for the other in order to effectuate the gift, when by so doing the real intentions of the donor would be defeated (*r*). For the judges cannot recognise any rule of equity which would enable them, by such a contrivance, to perfect an imperfect gift, even though it should be in favour of a *bonâ fide* present made by a husband to his wife. Still, such a gift as that just referred to will be deemed irrevocable, if it be effected by a declaration

(*i*) *Mellor* v. *Watkins*, (1874) L. R. 9 Q. B. 400; *Aldin* v. *Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 427; 63 L. J. Ch. 601. See also *Kerrison* v. *Smith*, *supra*; *Wilson* v. *Taverner*, [1901] 1 Ch. 578; 70 L. J. Ch. 263.

(*k*) *Hurst* v. *Picture Theatres, Lim.*, *supra*.

(*l*) See *M'Gonnell* v. *Murphy*, (1869) I. R. 3 Eq. 460.

(*m*) *Cosnahan* v. *Grice*, (1862) 15 Moo. P. C. R. 215; 137 R. R. 33.

(*n*) *Smith* v. *Smith*, (1733) 2 Str. 955; *Bunn* v. *Markham*, (1816) 2 Marsh. 532; 17 R. R. 497; *Powell* v. *Hellicar*, (1858) 26 Beav. 261; 28 L. J. Ch. 355; 122 R. R. 101; *McGonnell* v. *Murphy*, (1869) I. R. 3 Eq. 460. See *Moore* v. *Moore*, (1874) L. R. 18 Eq. 474; 43 L. J. Ch. 617; *Rolls* v. *Pearce*, (1877) 5 Ch. D. 730; 46 L. J. Ch. 791; *Austin* v. *Mead*, (1880) 15 Ch. D. 651; 50 L. J. Ch. 30.

(*o*) *Shower* v. *Pilck*, (1849) 4 Ex. 478; 19 L. J. Ex. 113; 80 R. R. 681.

(*p*) See *Kilpin* v. *Ratley*, [1892] 1 Q. B. 582; *Cochrane* v. *Moore*, (1890) 25 Q. B. D. 57; 59 L. J. Q. B. 377. This case must be taken to have disposed of the opinion of Serjeant Manning that a gift of a chattel capable of delivery may be good without delivery if followed by some statement or act on the part of the donee testifying his acquiescence in the gift. See the note in 1 C. B. 381, n. (*d*), and note to same effect in 2 Man. & G. 691, n. (*a*); cited by Parke, B., in *Flory* v. *Denny*, (1852) 7 Ex. 583; 21 L. J. Ex. 223; 86 R. R. 746.

(*q*) *Milroy* v. *Lord*, (1862) 4 De Gex. F. & J. 264; 31 L. J. Ch. 798; 135 R. R. 135.

(*r*) *Breton's Estate, In re* (1881) 17 Ch. D. 416; 50 L. J. Ch. 369.

of trust, or if it be accompanied by delivery of possession (*s*). A gift, if made by deed, is complete without any delivery by the donor or acceptance by the donee, until disclaimer by the latter (*t*); but such disclaimer may be by parol (*u*). An assignment of chattels for a valuable consideration by way of mortgage will be binding upon the parties, though the instrument be not under seal, and though it be unaccompanied by any actual or symbolical delivery (*v*).

§ 976. Another class of transactions, which, at common law, are in general required to be evidenced by deeds, consists of contracts made, and acts done, by *corporations* (*x*). The general rule of law, that a corporation aggregate cannot express its will or do any act except under seal, may be traced to a remote antiquity, and is founded on the assumption, that the concurrence of the body corporate in any particular act, can best be authenticated by the affixing of the corporate seal to the document relating to such act (*y*). In short, the common seal has been termed, in the quaint phraseology of olden times, "the hand and mouth of the corporation" (*z*). This rule has been denounced in the United States as highly impolitic, and is now almost entirely superseded in practice (*a*); but in England, though it has been described by one of our most accomplished judges as "a relic of barbarous antiquity" (*b*), it still partially holds its ground.

(*s*) See *Bourne* v. *Fosbrooke*, (1865) 18 C. B. (N. S.) 515; 34 L. J. C. P. 164; 144 R. R. 588.

(*t*) *Siggers* v. *Evans*, (1855) 5 E. & B. 367; 24 L. J. Q. B. 305; 103 R. R. 521. See *Hobson* v. *Thellusson*, (1867) L. R. 2 Q. B. 642; 36 L. J. Q. B. 302.

(*u*) *Id.* Shep. Touch. 285.

(*v*) *Flory* v. *Denny*, *supra*.

(*x*) *Arnold* v. *Mayor of Poole*, (1842) 4 Man. & G. 860; 12 L. J. C. P. 97; 61 R. R. 664; *Mayor of Ludlow* v. *Charlton*, (1840) 6 M. & W. 815; 10 L. J. Ex. 75; 55 R. R. 794; *Church* v. *Imperial Gas Light and Coke Co.*, (1838) 6 A. & E. 861; 7 L. J. Q. B. 118; 45 R. R. 638; *Paine* v. *Strand Union*, (1846) 8 Q. B. 326; 15 L. J. M. C. 89; 70 R. R. 503; *Lamprell* v. *Billericay Union*, (1849) 3 Ex. 283, 306; 18 L. J. Ex. 282. As to contracts made by the London County Council, see 18 & 19 V. c. 120, s. 149, and 51 & 52 V. c. 41, s. 40 (8).

(*y*) *Mayor of Ludlow* v. *Charlton*, *supra*, per Rolfe, B.; *Church* v. *Imperial Gas Light and Coke Co.*, *supra*.

(*z*) *R.* v. *Bigg*, (1717) 3 P. Wms. 423, cited by Tindal, C.J., in *Gibson* v. *E. India Co.*, (1839) 5 Bing. N. C. 269; 8 L. J. C. P. 193; 50 R. R. 688. As to when a corporation may adopt a private seal, see *ante*, § 149.

(*a*) In 2 Kent, Com. 289, it is said, "At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of the *Bk. of Columbia* v. *Patterson*, (1813) 7 Cranch, 229, that whenever a corporation aggregate was acting within the range of the legitimate purposes of its institution, all parol contracts made by its authorised agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay." See also 6 A. & E. 837, per Patteson, J.

(*b*) *South of Ireland Colliery Co.* v. *Waddle*, (1869) L. R. 4 C. P. 618; 38 L. J. C. P. 338, per Cockburn, C.J., in Ex. Ch.

§ 977. From the earliest traceable periods the rule in question has, indeed, been subject to certain *exceptions*, which rest upon a principle of convenience, amounting almost to necessity (*c*), and which relate either to *trivial matters of frequent recurrence*, or to *such affairs* as from their nature *do not admit of delay* (*d*). Thus—to borrow the language of Mr. Baron Rolfe, in a well-considered case (*e*),—"A corporation, it is said, which has a head, may give a personal command, and do small acts; as it may retain a servant. It may authorise another to drive away cattle damage feasant, or to make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object. In such matters the head of the corporation seems, from the earliest times, to have been considered as delegated by the rest of the members to act for them."

§ 978. With the advent of trading companies the exceptions mentioned in the preceding paragraph have been considerably extended. In the case from which the above quotation is taken it is pointed out that "in modern times, a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the courts have held that they would imply in those, who are, according to the provisions of the Charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist." These observations are confined to *trading* companies, but several later decisions seem to warrant the assumption, that the rule may be now generally stated as applicable alike to all *corporations aggregate*, whenever the making of a certain description of contract is necessary and incidental to the purposes for which the corporation was created (*f*).

§ 979. In accordance with the rule thus expounded, it has been held that an action will lie against a gas company for meters sold to

(*c*) *Church* v. *Imperial Gas Light and Coke Co.*, *supra*, cited by Rolfe, B., in *Mayor of Ludlow* v. *Charlton*, *supra*.

(*d*) *Arnold* v. *Mayor of Poole*, *supra*; *De Grave* v. *Mayor of Monmouth*, (1830) 4 C. & P. 111.

(*e*) *Mayor of Ludlow* v. *Charlton*, *supra*.

(*f*) *Clarke* v. *Cuckfield Union*, (1851) 1 Bail Ct. Cas. 85, 86, 89, per Wightman, J., in an elaborate argument. See also *Nicholson* v. *Bradfield Union*, (1866) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; *Wells* v. *Kingston-upon-Hull*, (1875) L. R. 10 C. P. 402; 44 L. J. C. P. 257 S. C.

them (*g*), and an action is maintainable by them against the consumer, either for not accepting gas according to his agreement (*h*), or for the price of gas supplied to him (*i*). So, where a colliery company had verbally contracted with an engineer for the erection of machinery to work their mine, and had paid him part of the price, they were permitted to recover damages from him for breach of this agreement (*k*). Actions have also been held to lie against the guardians of the poor of a union (*l*), in one case for iron gates (*m*), in another for water-closets (*n*), and in a third for coals (*o*), which had respectively been supplied under parol contracts for the union workhouse. So, an accountant, employed to audit the books of a poor law union, has been permitted to maintain an action for work done as against the guardians, although the contract was not under seal (*p*). A surgeon, too, who had been retained by the general manager of a railway to attend a servant of the company injured by an accident on the line, was held entitled to recover his charges, though he had only been verbally engaged (*q*). So, a parol contract made by the directors of a chartered Navigation Company, by which they agreed to pay a person a certain salary in consideration of his going to Sydney and bringing home one of their ships, has been enforced as against the company, the plaintiff having performed his part of the agreement (*r*). And when the same company had bought some ale for the use of the passengers on board one of their steam vessels, and had paid for it, they were allowed to recover damages from the vendors on account of the ale being unfit for use, though the agreement for the purchase was not under seal (*s*).

§ 980. But, on the other hand, a contract with a *copper* mining

(*g*) *Beverley* v. *Lincoln Gas Light and Coke Co.*, (1837) 6 A. & E. 829; 7 L. J. Q. B. 113; 45 R. R. 626.

(*h*) *Church* v. *Imperial Gas Light and Coke Co.*, *supra*.

(*i*) *City of London Gas Light and Coke Co.* v. *Nicholls*, (1826) 2 C. & P. 365.

(*k*) *South of Ireland Colliery Co.* v. *Waddle*, *supra*.

(*l*) Who are constituted a corporation by the Act of 5 & 6 W. 4, c. 69, s. 7.

(*m*) *Sanders* v. *St. Neot's Union*, (1846) 8 Q. B. 810; 15 L. J. M. C. 104; 70 R. R. 663. But see *Smart* v. *West Ham Union*, (1855) 10 Ex. 687; 24 L. J. Ex. 201; 102 R. R. 871.

(*n*) *Clarke* v. *Cuckfield Union*, (1851) 1 Bail Ct. Cas. 81. See *Pauling* v. *London and N. Western Ry.*, (1853) 8 Ex. 687.

(*o*) *Nicholson* v. *Bradfield Union*, (1866) L. R. 1 Q. B. C. 20; 35 L. J. Q. B. 176.

(*p*) *Haigh* v. *North Bierley Union*, (1858) 28 L. J. Q. B. 62; E. B. & E. 873; 112 R. R. 924.

(*q*) *Walker* v. *Gt. Western Ry.*, (1867) 2 L. R. Ex. 228; 36 L. J. Ex. 123; Ex. 228. This case overrules *Cox* v. *Midland Ry.*, (1849) 3 Ex. 268; 18 L. J. Ex. 65; 77 R. R. 623; so far as relates to the necessity of a sealed contract.

(*r*) *Henderson* v. *Australian Royal Mail Steam Nav. Co.*, (1855) 5 E. & B. 409; 24 L. J. Q. B. 322; 103 R. R. 538. See also *Reuter* v. *Elect. Teleg. Co.*, (1856) 6 E. & B. 341; 26 L. J. Q. B. 46; 106 R. R. 625.

(*s*) *Australian Royal Mail Steam Nav. Co.* v. *Marzetti*, (1855) 11 Ex. 228; 24 L. J. Ex. 273; 105 R. R. 505.

company for a supply by them of *iron* rails (*t*); a contract with a water company for the supply to them of iron pipes (*u*); a contract for erecting engines and machinery for a water company (*v*); a contract with a railway company to execute extensive repairs on their permanent line of rails (*x*); a contract with guardians of the poor to make a map of the rateable property of a parish in the union (*y*); a contract with guardians to do some extra work in building a poor-house (*z*); and a contract with guardians for the engagement of a clerk to the master of a workhouse (*a*), have each and all of them been held to relate to matters which were not of such frequent occurrence, or of so small importance, or so essentially necessary for the purposes for which the corporations were respectively instituted, as to be taken out of the general rule requiring the contracts of corporations to be under seal (*b*); and even before the East India Company ceased to be merchants, it was held, that the allowance by them of a retiring pension to a military officer could not be enforced in a court of law, unless it were granted by deed (*c*).

§ 981. It has long since been determined that corporations may be liable in *tort* for the acts of their servants, though such servants be not authorised by any instrument under seal (*d*); and the rule

(*t*) *Copper Miners' Co.* v. *Fox*, (1851) 16 Q. B. 229; 20 L. J. Q. B. 174; 83 R. R. 439.

(*u*) *E. London Waterworks Co.* v. *Bailey*, (1827) 4 Bing. 283; 5 L. J. C. P. 175; explained by Ld. Denman in *Church* v. *Imperial Gas Light and Coke Co.*, (1838) 6 A. & E. 860-862; 7 L. J. Q. B. 118; 45 R. R. 638. This case would seem now to be overruled. See *ante*, § 979.

(*v*) *Homersham* v. *Wolverhampton Waterworks Co.*, (1851) 6 Ex. 137; 20 L. J. Ex. 193. This case is probably not law. See *ante*, § 979.

(*x*) *Diggle* v. *London and Blackwell Ry.*, (1850) 6 Ex. 442; 19 L. J. Ex. 308.

(*y*) *Paine* v. *Strand Union*, (1846) 8 Q. B. 326; 15 L. J. M. C. 89; 70 R. R. 503.

(*z*) *Lamprell* v. *Billericay Union*, (1849) 3 Ex. 283.

(*a*) *Austin* v. *Guardians of Bethnal Green*, (1874) L. R. 9 C. P. 91; 43 L. J. C. P. 100.

(*b*) *Church* v. *Imperial Gas Light and Coke Co.*, *supra*, explaining *E. London Waterworks Co.* v. *Bailey*, *supra*. See also *Paine* v. *Strand Union*, *supra; Ernest* v. *Nicholls*, (1857) 6 H. L. C. 401; 108 R. R. 175; *London Dock Co.* v. *Sinnott*, (1857) 8 E. & B. 347; 27 L. J. Q. B. 129; 112 R. R. 593; *Prince of Wales Life Ass. Co.* v. *Harding*, (1858) 27 L. J. Q. B. 297; E. B. & E. 183; 113 R. R. 594.

(*c*) *Gibson* v. *East India Co.*, (1839) 5 Bing. N. C. 262; 8 L. J. C. P. 193; 50 R. R. 688. See *Cope* v. *Thames Haven Dock and Ry.*, (1849) 3 Ex. 841; 18 L. J. Ex. 345; 77 R. R. 859. In *Kelly* v. *Mid. G. W. Ry.*, (1872) I. R. 7 C. L. 8, Whiteside, C.J., and in *Abrath* v. *N. E. Ry.*, (1886) 11 App. Cas. 247; 55 L. J. Q. B. 457, Lord Bramwell expressed grave doubts whether an action for malicious prosecution could be maintained against a corporation aggregate. It is, however, now clearly settled that such an action may be maintained: *Bank of N. S. W* v. *Owston*, (1879) 4 App. Cas. 270; 48 L. J. P. C. 25; *Edwards* v. *Mid. Ry. Co.*, (1880) 9 Q. B. D. 287; 50 L. J. Q. B. 51; *Kent* v. *Courage & Co.*, (1891) 55 J. P. 264; *Cornford* v. *Carlton Bank, Lim.*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196; [1900] 1 Q. B. 22; 68 L. J. Q. B. 1020.

(*d*) *East Coast Ry.* v. *Broom*, (1851) 6 Ex. 314; 20 L. J. Ex. 196; *Whitfield* v. *S. Eastern Ry.*, (1858) 27 L. J. Q. B. 229; E. B. & E. 115; 113 R. R. 568. This was an action for a libel transmitted by telegraph from one station to another on the

requiring corporations to act by deed will not protect them, either from an action of trover, where goods have been wrongly taken by their agent (*e*), or from an action for money had and received, where they have wrongfully possessed themselves of money belonging to the plaintiff (*f*). This last exception rests on necessity; for, as a corporation would scarcely put their seal to a promise to return moneys wrongfully received by them, it follows that if a seal were necessary, the injured party would be without remedy (*g*). Again, an action for use and occupation is clearly maintainable by a corporation (*h*), and is probably maintainable against a corporation (*i*), whenever the defendants have actually occupied the plaintiff's premises, and no demise under seal has been executed; but this doctrine seems to rest on the peculiar language and object of the statute enabling landlords to bring such a form of action (*k*), and it certainly does not extend to cases of mere constructive holding (*l*).

§ 982. In the application of the above rule, and its exceptions, the question has often been discussed, as to how far a distinction can be recognised between executed and executory contracts, and the old decisions on this subject are confessedly irreconcilable. The old Court of Queen's Bench—apparently shocked at the gross injustice that might be perpetrated if a corporate body, after having received the

defendants' line of rails. See also *Green* v. *London General Omnibus Co.*, (1859) 7 C. B. (N. S.) 290; 29 L. J. C. P. 13; 121 R. R. 497; *Roe* v. *Birkenhead, Lanc. and Cheshire Junc. Ry.*, (1851) 7 Ex. 36; 21 L. J. Ex. 9; 86 R. R. 564; *Goff* v. *Gt. North. Ry.*, (1869) 3 E. & E. 672; 30 L. J. Q. B. 148; 122 R. R. 889; *Moore* v. *Metropolitan Ry.*, (1872) L. R. 8 Q. B. 36; *Poulton* v. *London and South Western Ry.*, (1867) L. R. 2 Q. B. 534; 30 L. J. Q. B. 294; *Stewart* v. *Anglo-Califor. Gold Mining Co.*, (1852) 18 Q. B. 736; 21 L. J. Q. B. 393; *Stevens* v. *Midland Ry. and Lander*, (1854) 23 L. J. Ex. 328; 10 Ex. R. 352; 102 R. R. 624.

(*e*) *Yarborough* v. *Bank of England*, (1812) 16 East, 6; 14 R. R. 272.

(*f*) *Hall* v. *Mayor of Swansea*, (1844) 5 Q. B. 526; 13 L. J. Q. B. 107; 64 R. R. 564.

(*g*) Conversely and consistently with this rule it is held that a corporation may be liable for a libel: *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423; 73 L. J. P. C. 102; *Nevill* v. *Fine Arts, &c., Co.*, [1895] 2 Q. B. 156; 64 L. J. Q. B. 681; *Whitfield* v. *S. E. Ry. Co., supra*; or for a malicious prosecution (see cases cited in last note but three). In this connection it may he observed that a corporation can maintain an action for a libel affecting the corporate property, but cannot maintain one for a libel charging it with an offence—such as corruption—of which only the individuals constituting it can be guilty, and not the corporation itself in its corporate capacity: *Mayor, &c., of Manchester* v. *Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23.

(*h*) *Mayor of Stafford* v. *Till*, (1827) 4 Bing. 77; 5 L. J. (O.S.) C. P. 77; 29 R. R. 511; *Dean & Ch. of Rochester* v. *Pierce*, (1808) 1 Camp. 466; *Southwark Bridge Co.* v. *Sills*, (1826) 2 C. & P. 371; *Mayor of Carmarthen* v. *Lewis*, (1834) 6 C. & P. 608. See *Doe* v. *Bold*, (1847) 11 Q. B. 127; 75 R. R. 304.

(*i*) *Finlay* v. *Bristol & Exeter Ry.*, (1852) 7 Ex. 409; 21 L. J. Ex. 117; 86 R. R. 704; *Lowe* v. *London & N. Western Ry.*, (1852) 18 Q. B. 632; 21 L. J. Q. B. 361; 88 R. R. 726. See *ante*, § 974.

(*k*) 11 G. 2, c. 19, s. 14.

(*l*) *Finlay* v. *Bristol & Exeter Ry., supra.*

benefit under a contract, were to be allowed to refuse to pay on the ground that the contract was not under seal, on several occasions decided that the objection could not be taken where the corporation had received the whole consideration for which it had bargained (*m*).

§ 983. In the Chancery Courts, too, it has been held that corporations may be bound by acquiescence in a continuing contract (*n*).

§ 984. On the other hand, the old Court of Exchequer more than once held that a corporation is not precluded from relying on the absence of a seal, when works have been executed under a parol contract, even though such works have received the approval of the corporation, which enjoyed the full benefit of them (*o*). The judges of the Common Pleas, too, seem to have adopted the same rule; for where a solicitor, who had been appointed, but not under seal, by the mayor and town council of a borough to conduct suits, brought an action against the corporation for his costs, they held that he could not recover (*p*).

§ 984A. The question has, however, been recently before the Court of Appeal in a case (*q*) in which the plaintiff, an engineer, brought an action against a Rural District Council for remuneration for services rendered at their request in regard to a scheme for sewerage contemplated by them, and for other work in connection therewith. The contract was not under seal, but the work had been entirely executed by the plaintiff. The Court, after reviewing the previous decisions, adopted and approved those in the Court of Queen's Bench above referred to; and laid down the rule that where the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry those purposes into effect, and orders are given by the corporation in relation to work to be done or goods to be

(*m*) *Sanders* v. *St. Neot's Union*, (1846) 8 Q. B. 810; 15 L. J. M. C. 104; 70 R. R. 663; *Clarke* v. *Cuckfield Union*, (1851) 21 L. J. Q. B. 349; *Beverley* v. *Lincoln Gas Co.*, (1837) 6 A. & E. 829; 7 L. J. Q. B. 113; 45 R. R. 626; *Nicholson* v. *Bradford Union*, (1866) L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; *Doe* v. *Taniere*, (1848) 12 Q. B. 998; 18 L. J. Q. B. 49; 76 R. R. 450.

(*n*) *Crook* v. *Corporation of Seaford*, (1871) L. R. 6 Ch. 551.

(*o*) *Lamprell* v. *Billericay Union*, (1849) 3 Ex. 307. See, also, *Diggles* v. *London & Blackwall Ry.*, (1850) 5 Ex. 442; 19 L. J. Ex. 308; *Homersham* v. *Wolverhampton Waterworks Co.*, (1851) 6 Ex. 137; 20 L. J. Ex. 193; *Mayor of Ludlow* v. *Charlton*, (1840) 6 M. & W. 815; 10 L. J. Ex. 75; 55 R. R. 794.

(*p*) *Arnold* v. *Mayor of Poole*, (1842) 4 Man. & G. 860; 12 L. J. C. P. 97; 61 R. R. 664. See, also, *Clemenshaw* v. *Corporation of Dublin*, (1875) I. R. 10 C. L. 1.

(*q*) *Lawford* v. *Billericay Rural Council*, [1903] 1 K. B. 772; 72 L. J. K. B. 554. In America it is held that where a corporation makes a contract which is *ultra vires* or unsealed, of which the defendant has already had the benefit, the remedy of the aggrieved party is to disaffirm the contract, and sue upon a *quantum meruit* for the value of the work done: see *Brunswick Gas, &c., Co.* v. *United Gas Co.*, (1893) 35 Am. St. R. 385; and also *Kadish* v. *Garden City, &c.*, (1894) 42 Am. St. R. 256.

supplied to carry those purposes into effect, then if the work done or goods supplied are accepted by the corporation and the whole consideration is executed, a contract to pay will be implied from the acts of the corporation, and the absence of a contract under the seal of the corporation will be no answer to an action brought in respect of the work done or the goods supplied. The decision in this case, it will be noticed, is strictly limited to cases in which the contract upon which the action is brought is wholly executed upon one side, and as to how far, if at all, a plaintiff can recover in an action upon a contract made by a corporation not under seal which has been only partly executed, there appears to be no authoritative decision, but it is submitted that a plaintiff in such a case would be entitled to recover on a *quantum meruit* for the price of the goods or work which had been actually accepted.

§ 985. In order to authorise an *agent* to execute a deed for his principal, the authority must be given by an instrument under seal (*r*); and as such an instrument, or power of attorney, transfers no interest, the agent or attorney being merely put thereby in the place of the principal, it follows that the deed must be executed by the agent in the name and as the act of him who gave the power (*s*). Neither can a parol ratification, not amounting to a re-delivery (*t*), by the principal in a deed executed by his agent give validity to the deed, when the agent has not been authorised to act by an instrument under seal (*u*); though it seems that evidence of an express, if not of an implied, recognition or adoption of the deed by the principal, will, as against him, raise a presumption that the agent was thus formally authorised to act, so as to dispense with the necessity of proving that fact (*v*).

§ 986. There are, moreover, some cases in which deeds are rendered necessary by statute law. For example, transfers of shares in companies incorporated by Act of Parliament are by the Companies Clauses Consolidation Act, 1845 (*x*), required to be by deed duly stamped, in which the consideration shall be duly stated; and such deed may be according to the form given by the Act, or to the like

(*r*) *Berkeley* v. *Hardy*, (1826) 5 B. & C. 355; 4 L. J. (O.S.) K. B. 184; 29 R. R. 261; *White* v. *Cuylen*, (1795) 6 T. R. 176; 3 R. R. 147; *Steiglitz* v. *Egginton*, (1815) Holt, N. P. R. 141; 17 R. R. 622; *Williams* v. *Walsby*, (1803) 4 Esp. 220; *Callaghan* v. *Pepper*, (1840) 2 Ir. Eq. R. 399.

(*s*) *Hunter* v. *Parker*, (1840) 7 M. & W. 343; 10 L. J. Ex. 281; 56 R. R. 723; per Parke, B., *M'Ardle* v. *Irish Iodine Co.*, (1864) 15 Ir. C. L. R. 146.

(*t*) *Tupper* v. *Foulkes*, (1861) 30 L. J. C. P. 214; 9 C. B. (N.S.) 797; 127 R R. 889.

(*u*) *Hunter* v. *Parker*, *supra*.

(*v*) *Tupper* v. *Foulkes*, *supra*. But see *Ld. Gosford* v. *Robb*, (1845) 8 Ir. L. R. 217.

(*x*) 8 & 9 V. c. 16.

effect. But there exists no provision requiring transfers of shares in companies incorporated under the Joint Stock Companies Acts to be made by deed.

§ 987. On the other hand, some exceptions have been created by statute to the common law rule which requires that the contracts of corporations shall be made by deed. Thus, with regard to the contracts of companies incorporated by Act of Parliament since its date, it is by the Companies Clauses Consolidation Act, 1845 (*y*), provided that "the power which may be granted to any" committee of directors "to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows:—that is to say, With respect to any contract, which, if made between private persons, would be by law required to be in writing and under seal, such committee, or the directors, may make such contracts on behalf of the company in writing and under the common seal of the company, and in the same manner may vary or discharge the same: With respect to any contract, which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee, or the directors, may make such contract on behalf of the company in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same: With respect to any contract, which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company by parol only without writing, and in the same manner may vary or discharge the same. And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought, had the same contracts been made between private persons only."

§ 988. Under this section it has been held, that the fact of sleepers having been furnished to a railway company, and actually received and used by them, in pursuance of a contract made with an agent of the company upon certain terms, afforded reasonable evidence whence a jury might infer that the directors had agreed on behalf of the company to accept the goods on those terms (*z*).

(*y*) 8 & 9 V. c. 16, s. 97.

(*z*) *Pauling* v. *London & North Western Ry.*, (1853) 8 Ex. 867; 23 L. J. Ex. 105; 91 R. R. 807.

§ 989. The contracts also of such joint-stock companies as are registered under the Companies Acts (*a*), are not subject to the common law rule just discussed, but may be made in nearly the same manner as contracts under the Companies Clauses Consolidation Act. A special law, too, prevails with respect to the making, accepting, or indorsing of promissory notes or bills of exchange on account of such companies (*b*), and also with respect to the execution abroad of deeds made on their behalf (*c*). The memoranda of association, by which joint-stock companies are now incorporated, and the articles of association, by which the affairs of such companies may be regulated, are not required to be executed under seal; but after registration they become as binding as deeds on every shareholder who has signed them (*d*).

§ 990. Returning to the consideration of instances in which particular evidence (by document or otherwise) of particular transactions is required by statute, the following further instances are to be noted.

§ 991. The Act to simplify the transfer of property (*e*) rendered a *deed* necessary in all cases of partitions, exchanges, assignments, or surrenders in writing of freehold or leasehold lands, or of leases in writing of freehold, copyhold, or leasehold lands (*f*), provided the

(*a*) The Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 69 (substantially adopting the language used in the earlier Acts) enacts, that " (1) Contracts on behalf of a company may be made as follows; (that is to say),

" (i) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged :

" (ii) Any contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, and may in the same manner be varied or discharged :

" (iii) Any contract which if made between private persons would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, and may in the same manner be varied or discharged :

" (2) All contracts made according to this section shall be effectual in law, and shall bind the company and its successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be." See *Eley* v. *The Positive Governm. &c. Co.*, (1875) 45 L. J. Ex. 58; 1 Ex. D. 20.

(*b*) 8 Edw. 7, c. 69, s. 77. See *Peruvian Ry.* v. *Thames & Mersey Marine Insurance Co.*, (1867) L. R. 2 Ch. 617; 36 L. J. Ch. 864.

(*c*) 8 Edw. 7, c. 69, s. 78.

(*d*) 8 Edw. 7, c. 69, s. 14. See *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association*, [1915] 1 Ch. 881; 84 L. J. Ch. 688.

(*e*) 7 & 8 V. c. 76. This Act was, within a year of its passing, repealed by 8 & 9 V. c. 106.

(*f*) 7 & 8 V. c. 76, ss. 3 & 4; *Burton* v. *Reevell*, (1847) 16 M. & W. 307; 16 L. J. Ex. 85; 73 R. R. 512; *Doe* v. *Moffatt*, (1850) 15 Q. B. 257; 19 L. J. Q. B. 438.

transfer has been effected between the 1*st of January* (*g*) and the 1*st of October* (*h*), 1845.

§ 992. This Act was succeeded by 8 & 9 V. c. 106, which enacts in section 2, "that after the 1st day of October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery"; or, in other words, shall pass by the delivery of the deed of conveyance, in the same manner as incorporeal hereditaments have heretofore passed. Section 3 of this statute further enacts, "that a *feoffment*, made after the said 1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a *partition* and an *exchange* of any tenements or hereditaments not being copyhold—and a *lease*, required by law to be in writing (*i*), of any tenements or hereditaments —and an *assignment of a chattel interest*, not being copyhold, in any tenements or hereditaments—and a *surrender* in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing—made after the 1st of October, 1845, shall also be *void* at law, unless made by *deed*: Provided always, that the said enactment, so far as the same relates to a release (*k*) or a surrender, shall not extend to Ireland."

§ 993. This last enactment, so far as it relates to feoffments, partitions, exchanges, assignments, and surrenders, is of little practical importance, since, before the passing of the Act, such transfers were almost invariably effected by deed. With respect, however, to *leases* the statute has proved highly beneficial (*l*); for by requiring all demises for a period exceeding three years (*m*) to be under seal, it has gradually diminished, and at last dried up, that fruitful source of litigation, which used to spring from the difficulty of distinguishing between an actual lease and an agreement for a lease under the old law. The effect of the statute was that *in law* the party taking

(*g*) 7 & 8 V. c. 76, s. 13.

(*h*) 8 & 9 V. c. 106, s. 1.

(*i*) See *post*, § 1001.

(*k*) This is obviously a misprint for "lease"; but the blunder has been remedied by 23 & 24 V. c. 154, s. 104, and Sch. B., Ir., which repeats, so far as Ireland is concerned, that part of s. 3 of 8 & 9 V. c. 106, which relates to leases, assignments, and surrenders.

(*l*) The statute does not apply to agreements for letting tolls of turnpike roads under 3 G. 4, c. 126, ss. 55, 57; *Shepherd* v. *Hodsman*, (1852) 18 Q. B. 316; 21 L. J. Q. B. 263; recognised by Byles, J., in *Markham* v. *Standford*, (1863) 14 C. B. (N.S.) 380; 135 R. R. 739.

(*m*) A lease for eighteen months, with power to lessee, by giving a month's notice, to prolong the term to a further period of two years, is not within the meaning of the statute: *Hand* v. *Hall*, (1877) 2 Ex. D. 355; 46 L. J. Ex. 603.

possession of land under a lease or agreement for a period exceeding three years, not under seal, was a mere tenant at will, liable to become, by the payment and acceptance of rent, a tenant from year to year, and thenceforth to be subject to all those stipulations in the agreement which are applicable to such a tenancy (*n*). But although the statute provided that such leases should be *void at law* unless made by deed, the Courts of Equity held that any person who had given or taken possession under a lease or agreement capable of specific performance, although such lease or agreement was void at law under the statute, was not only entitled to specific performance of the agreement by the execution of a valid lease, but was to be treated in equity as actual lessor or lessee upon the terms of the lease agreed to be granted from the time possession was taken. Since the passing of the Judicature Acts, the rules of equity now prevail in all the Courts, the result, therefore, now is that in all cases where a tenant has entered into possession under a lease or agreement for a lease void at law, but of which under the circumstances stated above specific performance can be enforced (*o*), he is considered to hold upon the same terms as if a valid lease had actually been granted (*p*).

§ 994. Although leases for any term exceeding three years are void at law unless granted by deed, an equally formal instrument is not required for the purpose of confirming leases executed under powers of leasing, which are invalid by reason of some deviation from the terms of the power, for it is enacted (*q*), that the *confirmation*, which shall suffice to establish the validity of any such defective lease, "may be by memorandum or note in writing signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised."

§ 995. By the Public Health Act, 1875, all contracts "whereof the value or amount exceeds £50" which shall be made by an urban sanitary authority, must be in writing, and be sealed with the common seal of such authority (*r*). The Public Health (Ireland) Act, 1878, contains a similar clause (*s*).

(*n*) *Martin* v. *Smith*, (1874) L. R. 9 Ex. 50; 43 L. J. Ex. 42. See *post*, § 1001, *ad fin.*

(*o*) *Coatsworth* v. *Johnson*, (1886) 55 L. J. Q. B. 220.

(*p*) *Walsh* v. *Lonsdale*, (1882) 21 Ch. D. 9; 53 L. J. Ch. 2; and see *Allhasen* v. *Brooking*, (1884) 26 Ch. D. 559; 53 L. J. Ch. 520; *In re Moughan*, (1885) 14 Q. B. D. 956; 54 L. J. Q. B. 128; *Lowther* v. *Heaves*, (1889) 41 Ch. D. 248; 58 L. J. Ch. 482; *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103.

(*q*) 13 & 14 V. c. 17, s. 3.

(*r*) 38 & 39 V. c. 55, s. 174. See *Hunt* v. *Wimbledon Local Board*, (1878) 3 C. P. D. 208; 48 L. J. C. P. 207; *Eaton* v. *Basker*, (1881) 6 Q. B. D. 201; 72 B. D. 529; 50 L. J. Q. B. 444; *Young* v. *Corpn. of Leamington*, (1883) 8 Q. B. D. 597; 8 App Cas. 517; 52 L. J. Q. B. 713; *Att.-Gen.* v. *Gaskill*, (1882) 22 Ch. D. 519; 52 L. J. Ch. 162.

(*s*) 41 & 42 V. c. 52, s. 201.

§ 995A. Debentures issued under the Mortgage Debenture Acts of 1865 and 1870 must be deeds (*t*).

§ 996. Secondly (*u*), as regards writings not under seal. It is in many cases (for the most part by statute) required that certain transactions be in writing.

§ 997. Thus absolute assignments of debts and other choses in action must, by virtue of the Judicature Act, 1873, be absolutely assigned "by writing under the hand of the assignor" (*v*); and if express notice in writing be given to the debtor, trustee, or other person liable, such assignment will, from the date of the notice, transfer the legal right to the assignee (*x*).

§ 998. The assignment of the copyright in any work is not valid unless it be in writing (*y*).

§ 999. The next transaction which requires notice is the *sale* of a British *ship*, or of any share therein. The Act which regulates these sales is the Merchant Shipping Act of 1894 (*z*), which in section 24

(*t*) 28 & 29 V. c. 78; 33 & 34 V. c. 20, s. 15. But debentures, stock certificates to bearer, or annuity certificates issued in pursuance of the Local Loans Act, 1875 (38 & 39 V. c. 83) may, as it seems, be valid, if duly signed, without the impression of any seal. Under this last Act, debentures, stock certificates, and annuity certificates, when respectively payable to bearer, are transferable by delivery; while what are called "nominal securities" must be transferred "by *writing* in manner directed by the local authority." Irrespective of the statute law, debentures under the seal of a corporation will not, as it seems, be regarded as promissory notes, or even as negotiable instruments, though they may be drawn in express terms as payable to bearer: *Crouch* v. *Crédit Foncier of England*, (1873) L. R. 8 Q. B. 374; 42 L. J. Q. B. 183.

(*u*) *Supra*, § 972.

(*v*) As to what will amount to an assignment of a debt, see *Buck* v. *Robson*, (1878) 3 Q. B. D. 686; 48 L. J. Q. B. 250; and to the assignment of a chose in action, see *Brice* v. *Bannister*, (1878) 47 L. J. Q. B. 722; 3 Q. B. D. 569; *Ex parte Hall, In re Whitting*, (1878) 10 Ch. D. 615; 48 L. J. Bk. 79; *Walker* v. *Bradford Old Bk.*, (1884) 12 Q. B. D. 511; 53 L. J. Q. B. 280; *Tancred* v. *Delagoa Bay Ry.*, (1889) 23 Q. B. D. 239; 58 L. J. Q. B. 459. As to what will amount to an *absolute* assignment see *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765; 67 L. J. Q. B. 484; *Mercantile Bank* v. *Evans*, [1899] 2 Q. B. 613; 68 L. J. Q. B. 921; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190; 71 L. J. K. B. 630; *Comfort* v. *Betts*, [1891] 1 Q. B. 737; 60 L. J. Q. B. 656; *Wiesener* v. *Rackow*, (1897) 76 L. T. 448; *Brandts* v. *Dunlop Co.*, [1905] A. C. 454; 74 L. J. K. B. 898. As to what are debts or choses in action assignable under the Judicature Act, see *Dawson* v. *Great Northern and City Ry.*, [1905] 1 K. B. 260; 74 L. J. K. B. 190; *May* v. *Lane*, (1895) 64 L. J. Q. B. 236; *Earl's Shipbuilding Co.* v. *Atlantic Transport Co.*, (1899) 43 Sol. J. 691; *Jones* v. *Humphries*, [1902] 1 K. B. 10; 71 L. J. K. B. 23.

(*x*) 36 & 37 V. c. 66, s. 25, sub-s. 6; 40 & 41 V. c. 57, s. 28, sub-s. 6, Ir. See *Burlinson* v. *Hall*, 53 L. J. Q. B. 222; (1884) 12 Q. B. D. 347.

(*y*) The Copyright Act, 1911 (1 & 2 G. 5, c. 46), s. 5, sub-s. (2). An assignment of patent rights must be by deed to convey the legal estate; *Stewart* v. *Casey*, [1892] 1 Ch. 113; 61 L. J. Ch. 61; but a parol agreement to assign will be specifically enforceable in equity.

(*z*) 57 & 58 V. c. 60.

enacts (*a*), that "(1) A registered ship or a share therein (when disposed of to a person qualified to own a British ship), shall be transferred (*b*) by bill of sale. (2) The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the Form marked A in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by a witness or witnesses" (*c*). This enactment (*d*) applies as well to an executory contract for the sale, as to the absolute sale, of a ship (*e*). It renders an actual bill of sale necessary (*f*). The bill of sale must usually be executed by the transferor himself, but when a registered owner is desirous of selling or mortgaging an interest in a ship at a place out of the country, the registrar can allow the power of sale or mortgage to be exercised on the registered owner's behalf by another person, previously mentioned by the owner to the registrar, and whose name has been entered by the latter on the register (*g*). Lastly, it is at least doubtful whether any description of vessel used in navigation, not propelled by oars (*h*), can be sold without a bill of sale, though boats under fifteen tons burthen might, prior to 1st May, 1855 (*i*), have been transferred by parol (*k*), and though such vessels do not now require to be registered, if solely employed in river or coast navigation (*l*).

§ 999A. Policies of marine insurance were before the Judicature Act only assignable by indorsement on the policy in manner prescribed by the Policies of Marine Insurance Act, 1868. After the Judicature

(*a*) This enactment applies only to British ships, *Union Bank of London* v. *Lenanton*, (1878) 3 C. P. D. 243; 47 L. J. Ex. (App.) 409.

(*b*) As to how a ship may be *mortgaged*, and the effect of an unregistered mortgage of a ship, see *Keith* v. *Burrows*, (1876) 1 C. P. D. 722; 45 L. J. C. P. 876.

(*c*) The bill of sale does not require a stamp, 54 & 55 V. c. 39; Sched. "General Exemptions."

(*d*) As to provisions formerly in force (8 & 9 V. c. 89, s. 34), see *Duncan* v. *Tindal*, (1853) 13 C. B. 258; 22 L. J. C. P. 137; 93 R. R. 525; *Hughes* v. *Morris*, (1852) 2 De Gex. M. & G. 349; 21 L. J. Ch. 761; 95 R. R. 126; *M'Calmont* v. *Rankin*, (1852) 2 De Gex. M. & G. 403; 95 R. R. 151.

(*e*) *Batthyany* v. *Bouch*, (1881) 50 L. J. Q. B. 421; where the Court declined to follow *Liverpool Borough Bank* v. *Turner*, (1860) 2 De Gex, F. & J. 502; 30 L. J. Ch. 379; 129 R. R. 172. See *Chapman* v. *Callis*, (1861) 9 C. B. (N.S.) 769; 30 L. J. C. P. 241; 127 R. R. 876; *Stapleton* v. *Haymen*, (1865) 2 H. & C. 918; 33 L. J. Ex. 170; 133 R. R. 858.

(*f*) Though under the old law any instrument in writing which recited the certificate of registry was sufficient: *Hunter* v. *Parker*, (1840) 7 M. & W. 343, 344; 10 L. J. Ex. 281; 56 R. R. 723, per Parke, B.

(*g*) See 57 & 58 V. c. 60, ss. 39, 40.

(*h*) See 57 & 58 V. c. 60, ss. 24 and 742, tit. "Ship."

(*i*) When the Merchant Shipping Act, 1854, came into operation.

(*k*) *Benyon* v. *Cresswell*, (1848) 12 Q. B. 899; 18 L. J. Q. B. 1; 76 R. R. 439.

(*l*) As to this, see 57 & 58 V. c. 60, s. 2. See also ss. 3, 77 (6), 692 (3), 745 (1) (E).

Act, while remaining capable of assignment by indorsement as previously, they became assignable in the same manner as other choses in action. Now by the Marine Insurance Act, 1906 (*m*), a marine policy (not being non-assignable by its terms, as it may be (*n*)), may be assigned by indorsement thereon, or in any other customary manner. It may be assigned before or after loss. The assignee may sue in his own name, but, like assignees of other kinds of choses in action, obtains no better title than the assignor had (*o*). Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment is inoperative, but this does not affect the assignment of a policy after loss (*p*).

§ 1000. The most important of the Acts requiring the transactions specified in them to be in writing or by deed (as the case may be) is, however, the *Statute of Frauds*, passed in the reign of Charles II., the provisions of which Act have been extended to Ireland by 7 W. 3, c. 12, and have also been enacted, generally in the same words, in nearly all the United States (*q*). This celebrated statute we owe to the great lawyer, but indifferent statesman, Lord Nottingham, who appears to have been assisted in framing it by Sir Leoline Jenkins and Lord Hale (*r*); yet, notwithstanding these bright names, it is certainly drawn in so inartificial a manner as to confer little credit on the skill of the draftsmen; and if Lord Nottingham was justified, while speaking with parental pride of the principle of the measure, in declaring that it was an Act, every line of which was worth a subsidy (*s*)—the present generation, who can contemplate the almost endless litigation which its ambiguous language has caused, may add with more truth, if not with more sincerity, that every line of it has cost a subsidy. The blame, however, which may justly be cast on the wording of the Act, must be converted into unqualified praise, if regard be had to the objects which it seeks to attain, and which it has, in fact, to a great extent attained (*t*). It will then be seen that (*u*) the rules of evidence contained in this statute, are, for the most part, well calculated for the

(*m*) 6 Ed. 7, c. 41.
(*n*) S. 50 (1).
(*o*) S. 50.
(*p*) S. 51.
(*q*) 29 C. 2, c. 3; 4 Kent, Com. 95, and n. *b* (4th ed.). The Civ. Code of Louis. art. 2415, without adopting in terms the provisions of the Stat. of Frauds, declares generally, that all verbal sales of immovable property shall be void. 4 Kent, Com. 450, n. *a* (4th ed.).
(*r*) 3 Campbell's Lives of the Chancellors, 418.
(*s*) R. North's Life of Guildford, 209.
(*t*) In *Doe* v. *Harris*, (1838) 8 A. & E. 12; 7 L. J. Q. B. 76, Ld. Denman speaks of the Stat. of Frauds as "one of the wisest laws in principle, though far from being complete in its details, or fortunate in its execution."
(*u*) Gr. Ev. § 262, almost verbatim.

exclusion of perjury, by requiring, in the cases there mentioned, some more satisfactory evidence than mere oral testimony affords. The statute dispenses with no proof of consideration, which was previously required, and gives no efficacy to written contracts, which they did not previously possess (*v*). Its policy is to impose such requisites upon private transfers of property, as, without being hindrances to fair transactions, may either be totally inconsistent with dishonest projects, or may tend to multiply the chances of detection (*x*). The object of the present work will not admit of an extended consideration of the provisions of this statute; but will necessarily restrict us to a notice of the rules of evidence, which it has introduced.

§ 1001. By this statute, all leases, estates, and interests in lands, whether of freehold or for terms of years, and whether certain or uncertain (*y*), which have been created by livery and seisin only—that is, by mere matter in pais, without deed (*z*)—or by parol, and not put in writing, and signed by the parties creating the same, or their agents duly authorised in writing, are allowed only the force and effect of estates at will; except leases not exceeding the term of three years from the making thereof, whereon the rent reserved shall amount to two-thirds of the improved value (*a*). It seems to be now determined,

(*v*) 2 St. Ev. 472; *Rann* v. *Hughes*, 7 T. R. 350, n.; *Barrell* v. *Trussell*, (1811) 4 Taunt. 121.

(*x*) Rob. on Frauds, Pref. xxii. A learned note, at p. 359 of the 15th edit. (1892) of Greenleaf, points out various systems of law in which the principle of the Statute of Frauds may be traced, and also that the Roman law required written evidence in every one of the cases in which it is rendered necessary by the Statute of Frauds, citing N. de Lescut De Exam. Testium, 26 (Farince. Op. Tom. II., App. 243).

(*y*) Prior to 1st January, 1845, when 7 & 8 V. c. 76 came into operation, various of these could be created by parol. See *ante*, § 991.

(*z*) See per Patteson, J., and Ld. Denman, in *Cooch* v. *Goodman*, (1842) 2 Q. B. 592, 597; 11 L. J. Q. B. 225.

(*a*) The actual words of the Statute of Frauds, 29 C. 2, c. 3, s. 1, are, that "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding." S. 2 "excepts, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised." These provisions were enacted in s. 1 of 7 W. 3, c. 12, Ir.; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154, ss. 104, 105, and Sch. B. Ir. The law in Ireland is now regulated by s. 4 of the Act just cited, which enacts, that "every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold interest or estate, or for any definite period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, by the landlord, or his agent thereunto lawfully authorised in writing." See *Bayley* v. *M. of Conyngham*, (1863) 15 Ir. C. L. R. 406; *Chute* v. *Busteed*, (1862) 14 *id.* 115.

though the point is not wholly free from doubt, that the above provisions of the statute are not applicable to demises under seal (*b*); and, consequently, that an indenture of lease for more than three years need not be signed. It has been said more than once, that the tenancy described in the statute as "an estate at will," must be construed as a tenancy from year to year (*c*); but this is not strictly accurate; since a party who enters under an agreement void by the statute is, in point of law, tenant at will for the first year, though, like any other tenant at will, he will be converted into a tenant from year to year as soon as a yearly rent has been paid and accepted (*d*). In both characters, too, he will be subject to such of the terms of the agreement as are not inconsistent with the species of tenancy which the law under the circumstances creates (*e*); and, therefore, if one of the terms be that the tenant shall keep the premises in repair during his occupation (*f*), or that he shall paint in the seventh year of his tenancy (*g*), or that he shall pay his rent in advance (*h*), he will be liable to an action for a breach of any such term, notwithstanding the agreement is made void by the statute.

§ 1002. Although a parol lease for a longer period than the Act permits is inoperative as to its duration, still, if a tenant holds under it during the entire period, he may quit without notice at the expiration of the term. An example will illustrate this proposition. Suppose a parol lease of a house to have been granted for five years and a-half, commencing at Michaelmas, 1880, at a specified annual rent. The tenant has entered, and till Michaelmas, 1881, was a mere tenant at will. He then paid his rent, and continued in possession, and thereby became tenant from year to year until Michaelmas, 1885, capable of quitting, or liable to be ejected, on giving or receiving a six months' notice to expire on the 29th September in any year. At Lady-day, 1886, however, when the whole period of five years and a-half will have run out, either party will be at liberty to terminate the tenancy without

(*b*) *Aveline* v. *Whisson*, (1842) 4 Man. & G. 801; 12 L. J. C. P. 58; 61 R. R. 662; Shep. Touch. 56, n. 24; *Cooch* v. *Goodman*, *supra*; *Cherry* v. *Heming*, (1849) 4 Ex. 631; 19 L. J. Ex. 63; 80 R. R. 733; Contra, 2 Bl. Com. 306.

(*c*) *Clayton* v. *Blakey*, (1798) 8 T. R. 3; 4 R. R. 575; per Ld. Kenyon; 2 Smith, L. C.; *Berrey* v. *Lindley*, (1841) 3 Man. & G. 512; 11 L. J. C. P. 27; 60 R. R. 558; per Coltman, J.

(*d*) *Richardson* v. *Gifford*, (1834) 1 A. & E. 56; 3 L. J. K. B. 122; 40 R. R. 253; per Parke, J., 3 Man. & G. 512, n. *a*; and cases there cited; 2 Smith, L.C.

(*e*) *Berrey* v. *Lindley*, *supra*; *Doe* v. *Bell*, (1793) 5 T. R. 471; 2 R. R. 642; *Arden* v. *Sullivan*, (1850) 14 Q. B. 832; 19 L. J. Q. B. 268; 80 R. R. 409. See *Tooker* v. *Smith*, (1857) 1 H. & N. 732; 108 R. R. 796.

(*f*) *Richardson* v. *Gifford*, *supra*. See *Beale* v. *Sanders*, (1837) 3 Bing. N. C. 850; 6 L. J. C. P. 283; 43 R. R. 823; *Arden* v. *Sullivan*, *supra*.

(*g*) *Martin* v. *Smith*, (1874) 43 L. J. Ex. 42; L. R. 9 Ex. 50.

(*h*) *Lee* v. *Smith*, (1854) 9 Ex. 662; 23 L. J. Ex. 198; 96 R. R. 903.

any notice whatever (*i*). The term (*k*) of three years, for which a parol lease may be good, must be computed from the date of the agreement; and a term of three years to commence *in futuro*, will consequently not satisfy the statute (*l*). If a parol lease is made, to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest, arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively but a lease for a year certain, and therefore good, within the exception of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it (*m*).

§ 1003 (*n*). By the third section of the same statute (*o*), no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, in messuages, manors, lands, tenements, or hereditaments, could—prior to the 1st January, 1845 (*p*)—be assigned, granted, or surrendered, unless by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or his agent authorised by writing, or by act and operation of law. At common law, surrenders of estates for life or years in possession in things corporeal were good, though made by parol; but things incorporeal, as advowsons, rent, and the like, and interests in land not in possession, as remainders and reversions for life or years, lying in grant, could not, and still cannot, be surrendered except by deed (*q*). The effect of this section is not to dispense with any evidence required by the common law; but to add to its provisions somewhat of security, by requiring a new and more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this Act; but with respect to lands and tenements in possession, which, before the statute, might have been surrendered by words only, some note in writing, duly signed, is by the statute made essential to a valid surrender (*r*).

§ 1004. This section does not contain—like the first two sections

(*i*) *Berrey* v. *Lindley*, *supra*; *Doe* v. *Stratton*, (1828) 4 Bing. 446; 6 L. J. (O.S.) C. P. 50; *Doe* v. *Moffatt*, (1850) 15 Q. B. 257; 19 L. J. Q. B. 438; *Tress* v. *Savage*, (1854) 23 L. J. Q. B. 339; 4 E. & B. 36; 99 R. R. 338.

(*k*) Gr. Ev. § 263, in part.

(*l*) *Rawlins* v. *Turner*, (1699) 1 Ld. Ray. 736.

(*m*) Rob. on Frauds, 241—244.

(*n*) Gr. Ev. § 264, in part.

(*o*) 29 C. 2, c. 3; 7 W. 3, c. 12, § 1, Ir., was to the like effect; but that section has been repealed since the 1st Jan., 1861, see 23 & 24 V. c. 154, ss. 104, 105, and Sch. B. The law in Ireland is now contained in ss. 7 and 9 of the Act just cited.

(*p*) When 7 & 8 V. c. 76, came into operation. See *ante*, §§ 991—993.

(*q*) Co. Lit. 337*b*, 338*a*; 2 Shep. Touch. 330; 1 Wms. Saund. 236*a*; *Lyon* v *Reed*, (1844) 13 M. & W. 303; 13 L. J. Ex. 377; 67 R. R. 593; *ante*, §§ 973, 4.

(*r*) Rob. on Frauds, 248.

of the Act—any exception in favour of leases not exceeding the term of three years; and, consequently, it excludes alike parol assignments and parol surrenders of mere leases from year to year, though such leases have been created by verbal agreement (*s*). It seems, also, that a parol agreement by a lessee for the transfer of his interest in a term not exceeding three years, which is intended to take effect as an assignment, and is invalid as such, cannot operate as an underlease (*t*). If, however, both parties intend to create the relation of landlord and tenant, the mere fact of the parol demise passing all the lessor's interest in the premises will not prevent it from operating as a lease, at least for some purposes (*u*). The lessor, therefore, under these special circumstances, may maintain an action for use and occupation during the entire term, even should the lessee quit the premises before its expiration (*v*); and this, too, although the lessor, in consequence of having no reversion, cannot distrain for the rent in arrear (*x*).

§ 1005. The *surrender by act and operation of law*, mentioned in the statute, is a phrase to which it is difficult to assign a precise meaning. Its most obvious application is, "to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman; and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for years accepts from his lessor a grant of a rent, issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and as this could not be done during his term, therefore he is deemed in law to have surren-

(*s*) *Botting* v. *Martin*, (1808) 1 Camp. 319; *Mollett* v. *Brayne*, (1809) 2 Camp. 103; 11 R. R. 676; *Thomson* v. *Wilson*, (1818) 2 Stark. 379; 20 R. R. 696. See *Doe* v. *Wells*, (1839) 10 A. & E. 435; 8 L. J. Q. B. 265; 50 R. R. 473.

(*t*) *Barrett* v. *Rolfe*, (1845) 14 M. & W. 348; 14 L. J. Ex. 308; questioning *Poultney* v. *Holmes*, (1733) 1 Str. 405.

(*u*) *Pollock* v. *Stacy*, (1847) 9 Q. B. 1033, upholding *Poultney* v. *Holmes*, (1733) 1 Str. 405. But see *Beardman* v. *Wilson*, (1868) L. R. 4 C. P. 57; 38 L. J. C. P. 91.

(*v*) *Pollock* v. *Stacy*, *supra*.

(*x*) *Parmenter* v. *Webber*, (1818) 8 Taunt. 593; 20 R. R. 575; *Smith* v. *Mapleback*, (1786) 1 T. R. 441; 7 R. R. 750.

dered his term to the lessor" (*y*). In all these cases no question of intention can arise. The surrender is not the result of intention, but is the act of the law, and it takes place independent, and even in spite, of intention the most express (*z*).

§ 1006. Neither is it material, whether the interest taken by the surrenderor under the new arrangement, be or be not equivalent to that which he enjoyed under the surrendered term; and, therefore, if a lessee for life, or for a long term of years, accepts from his landlord a new demise for a shorter period, this will amount to a surrender of his original lease (*a*). At one time it was thought that a tenancy under a lease would be surrendered by operation of law, if the parties were to make a verbal agreement, for a sufficient consideration, that, instead of the existing term, there should be a tenancy from year to year at a different rent, or even a tenancy at will (*b*). This doctrine, however, has been much shaken of late years, and the better opinion now is, that nothing short of an express demise will operate as a surrender of an existing lease (*c*). Still, it is not necessary that the new demise should in all events be incapable of being defeated. For example, if a lessee were to accept, in accordance with his contract, a second lease voidable upon condition, this, even in the event of its avoidance, would amount to a surrender of the former term; because such second lease would pass *ab initio* the actual interest contracted for, though that interest would be liable to be defeated at some future period (*d*).

§ 1007. On the other hand, the acceptance of a void lease, which creates no new estate whatever (*e*), or even the acceptance of a voidable lease, which, being afterwards made void contrary to the intention of the parties, does not pass an interest according to the contract, will not operate as a surrender of a former lease (*f*). Nor will it make any difference in the consideration of this question, whether the surrender be express or implied; for as the Court of Queen's Bench observed on

(*y*) *Lyon* v. *Reed*, (1844) 13 M. & W. 306; 13 L. J. Ex. 377; 67 R. R. 593.

(*z*) *Id.*

(*a*) *Mellow* v. *May*, (1601) M. 636; recognised by Holroyd, J., in *Hamerton* v. *Stead*, (1824) 3 B. & C. 482, 483; 3 L. J. (O.S.) K. B. 33; 27 R. R. 407; and by Lefroy, B., in *Lynch* v. *Lynch*, (1843) 6 Ir. L. R. 142; 1 Wms. Saund. 236, *c*.

(*b*) See cases cited in last note.

(*c*) *Foquet* v. *Moor*, (1852) 7 Ex. 870; 22 L. J. Ex. 35; 86 R. R. 866; *Crowley* v. *Vitty*, (1852) *id.* 319.

(*d*) *Roe* v. *Abp. of York*, (1805) 6 East, 102; 8 R. R. 413; *Doe* v. *Bridges*, (1831) 1 B. & Ad. 847, 856; 9 L. J. (O.S.) K. B. 113; 35 R. R. 483; *Doe* v. *Poole*, (1848) 11 Q. B. 716, 723; 17 L. J. Q. B. 143; 75 R. R. 607; *Fulmerston* v. *Steward*, (1554) Plowd. 107 a, per Bromley, C.J.; Co. Lit. 45 a; *Lloyd* v. *Gregory*, (1638) Cro. Car. 501; *Whitley* v. *Gough*, (1556) Dyer, 140—146.

(*e*) *Roe* v. *Abp. of York*, *supra*; explained by Abbott, C. J., in *Hamerton* v. *Stead*, *supra*; *Lynch* v. *Lynch*, *supra*; *Wilson* v. *Sewell*, (1766) 4 Burr. 1980; *Davison* v. *Stanley*, (1768) *id.* 2213.

(*f*) *Doe* v. *Poole*, *supra*; *Doe* v. *Courtenay*, (1848) *id.* 702.

one occasion (*g*):—"In the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void, in case the grant should be made void."

§ 1008. Again, the mere fact of a tenant entering into an agreement to purchase the estate will not work a surrender of his tenancy by operation of law; because such a contract contains an implied condition that the landlord should make out a good title; and it would be most unreasonable to suppose, that the tenant intended absolutely to surrender an existing term, while it was uncertain whether the purchase would be completed or not (*h*). If, however, from the peculiar wording of the agreement, it could fairly be inferred that the tenant, from its date, was to be absolutely a debtor for the purchase-money, paying interest upon it, and to cease to pay rent, a tenancy at will would probably be created after that time; and the acceptance of such new demise would then operate as a surrender of the former interest (*i*). An agreement between a landlord and tenant during the existence of a lease, that the former should lay out money on the premises, and the latter pay an additional rent in consequence, does not create a new tenancy at an increased rent, so as to amount to a surrender of the old lease by operation of law (*k*).

§ 1009 (*l*). The simple cancellation of a lease, even though both parties consent (*m*), cannot work a surrender by operation of law, to divest the tenant's estate, because the intent of the statute is to take away the mode of transferring interests in lands by symbols and words only, as formerly used; and, therefore, a surrender by cancellation, which is but a sign, is also taken away; though a symbolical surrender may perhaps be still recognised in certain cases as the basis of equitable relief (*n*). It would seem that this rule equally applies, whether

(*g*) *Doe* v. *Courtenay*, (1848) 11 Q. B. 712; 17 L. J. Q. B. 151; 75 R. R. 600; overruling *Due* v. *Forwood*, (1842) 3 Q. B. 627; 11 L. J. Q. B. 321; 61 R. R. 339.

(*h*) *Doe* v. *Stanion*, (1835) 1 M. & W. 695, 701; 5 L. J. Ex. 253; 46 R. R. 464; *Tarte* v. *Darby*, (1846) 5 M. & W. 601; 15 L. J. Ex. 326.

(*i*) (1836) 1 M. & W. 701.

(*k*) *Donellan* v. *Read*, (1832) 3 B. & Ad. 905; 1 L. J. K. B. 269; 37 R. R. 588; *Lambert* v. *Norris*, (1837) 2 M. & W. 335; 6 L. J. Ex. 109; 46 R. R. 618.

(*l*) Gr. Ev. § 265, slightly.

(*m*) *Ld. Ward* v. *Lumley*, (1860) 5 H. & N. 87; 29 L. J. Ex. 322; 120 R. R. 494.

(*n*) *Magennis* v. *MacCullough*, Gilb. Eq. R. 236; *Roe* v. *Abp. of York*, *supra*; *Wootley* v. *Gregory*, 2 Y. & J. 536; *Bolton* v. *Bp. of Carlisle*, (1793) 2 H. Bl 263; *Doe* v. *Thomas*, (1829) 9 B. & C. 288; 7 L. J. (O.S.) K. B. 214; 32 R. R. 680;

the cancelled deed relates to things lying in livery, or to those which lie only in grant (*o*). Neither will the fact of the deed being found cancelled in the possession of the lessor, furnish in itself any presumption of an actual surrender by deed or note in writing; though it may be a circumstance fit for the consideration of the jury, if coupled with proof that the lessee has been out of possession for a series of years, or that the lessor's papers have been destroyed, or that other occurrences have happened, which might account for, or excuse, the non-production of the written surrender (*p*).

§ 1010. Though the doctrine of surrender by operation of law was originally confined to cases where the tenant accepted from his lessor a new interest, inconsistent with that which he previously had, it has by modern decisions been considerably extended, and is now applied, not only to the case where the second lease is granted to the lessee himself, or to the lessee and his wife, or to the lessee and a stranger (*q*), but to any act done by the landlord, which creates a new interest in a third party, inconsistent with the tenant's former interest; provided the tenant and third party concur in such act, and the former actually gives up possession in consequence of it (*r*). Thus, a demise by the lessor to a stranger, with the assent of the lessee, if coupled with an actual change of possession, is a surrender by operation of law of the lessee's interest, at least, if it be merely a chattel interest (*s*). Whether the same doctrine would apply to a case where the former lessee had a freehold interest may admit of some doubt. In *Lynch* v. *Lynch* (*t*), the Irish Court of Exchequer held that it would, but that decision

Walker v. *Richardson*, (1837) 2 M. & W. 882; 6 L. J. Ex. 229; 46 R. R. 782; *Natchbolt* v. *Porter*, (1689) 2 Vern. 112; Rob. on Frauds, 251, 252; *id.* 248, 249; *Holbrook* v. *Tirrell*, (1829) 9 Pick. 105 (Am.).

(*o*) *Bolton* v. *Bp. of Carlisle*, *supra*; *Walker* v. *Richardson*, *supra*.

(*p*) *Doe* v. *Thomas*, *supra*; *Walker* v. *Richardson*, *supra*. *Ante*, § 138.

(*q*) Shep. Touch. 301; *Hamerton* v. *Stead*, (1824) 3 B. & C. 478; 3 L. J. (O.S.) K. B. 33; 27 R. R. 407.

(*r*) *Thomas* v. *Cook*, (1818) 2 Stark. 408; 20 R. R. 374; *Stone* v. *Whiting*, (1817) 2 Stark. 235; 19 R. R. 710; *Dodd* v. *Acklom*, (1843) 6 Man. & G. 672; 13 L. J. C. P. 11; 64 R. R. 838; *Lynch* v. *Lynch*, (1843) 6 Ir. L. R. 131; *Walker* v. *Richardson*, *supra*; *Davison* v. *Gent*, (1856) 26 L. J. Ex. 122; 1 H. & N. 744; 108 R. R. 804; *Grimman* v. *Legge*, (1828) 8 B. & C. 324; 6 L. J. (O.S.) K. B. 321; 32 R. R. 398; *Bees* v. *Williams*, (1835) 2 Cr. M. & R. 581; 41 R. R. 794; *Graham* v. *Whichelo*, (1832) 1 Cr. & M. 188; 2 L. J. Ex. 70; 38 R. R. 605; *Reeve* v. *Bird*, (1834) 1 Cr. M. & R. 31; 3 L. J. Ex. 282; *Hall* v. *Burgess*, (1826) 5 B. & C. 332; 4 L. J. (O.S.) K. B. 172; *Nickells* v. *Atherstone*, (1847) 10 Q. B. 944; 16 L. J. Q. B. 371; 74 R. R. 556; *M'Donnell* v. *Pope*, (1852) 9 Hare, 705.

(*s*) Cases cited in last note. In *Doe* v. *Wood*, (1845) 14 M. & W. 682; 15 L. J. Ex. 41; 69 R. R. 781, M., tenant from year to year to B., died, leaving his widow in possession. A., some time after, took out administration, but the widow continued in possession paying rent to B. within A.'s knowledge, and A. not objecting. Held, that these facts did not amount to a surrender on A.'s part, by operation of law, and, consequently, that A., on proof of M.'s tenancy and death, and his own title as administrator, could recover in ejectment against the widow.

(*t*) (1843) 6 Ir. L. R. 131.

has been much shaken, if not overruled, by Lord St. Leonards, in the case of *Creagh* v. *Blood* (*u*). Although a parol licence to quit, even when followed by an actual quitting, will not of itself operate as a surrender of the tenant's interest (*v*); yet if the tenant, in pursuance of such a licence, gives up possession, and the landlord accepts it, the licence, coupled with the change of possession, will amount to a surrender by operation of law, and the landlord will not be able to recover any rent becoming due after his acceptance of the possession (*x*).

§ 1011. The modern extension of this doctrine of surrender, as explained in the early part of the preceding section, has been questioned by Lord Wensleydale, who has suggested that the cases on which it rests may be supported on the ground, that the occupation of the premises by the landlord's new tenants might "have the effect of eviction by the landlord himself, in superseding the rent or compensation for use and occupation during the continuance of that occupation" (*y*). Several of the cases may certainly be explained in this manner; and one was expressly decided on a somewhat similar ground (*z*); but in *Thomas* v. *Cook* (*a*), which is the leading authority on the subject, this point was neither suggested in argument, nor alluded to by the court; and in *Lynch* v. *Lynch* (*b*), which was much discussed in Ireland, the point could not have been taken at all, it being an action of ejectment brought by the former lessees for life, against the party who, with their consent, had been substituted in their place by the landlord. Moreover, the Court of Queen's Bench (*c*), and the Court of Exchequer also (*d*), have declared their dissent from the line of argument advanced by Lord Wensleydale, and have confirmed the rule laid down in *Thomas* v. *Cook*.

§ 1012. On the whole it is submitted that this rule is good law; and that, confined, as it is, to cases where an actual, and consequently a notorious, shifting of possession has occurred, no real danger need be apprehended from its continuance. Its adoption, where reversions

(*u*) (1845) 3 Jo. & Lat. 133, 161.

(*v*) *Mollett* v. *Brayne*, (1809) 2 Camp. 103; 11 R. R. 676. See, also, *Doe* v. *Milward*, (1838) 3 M. & W. 328; 7 L. J. Ex. 57; 49 R. R. 621; and *Johnstone* v. *Hudlestone*, (1825) 4 B. & C. 922; 4 L. J. (O.S.) K. B. 71; 28 R. R. 505.

(*x*) *Grimman* v. *Legge supra; Dodd* v. *Acklom*, *supra; Phene* v. *Popplewell*, (1862) 31 L. J. C. P. 235; 12 C. B. (N.S.) 334; 133 R. R. 355; *Whitehead* v. *Clifford*, (1814) 5 Taunt. 518; 15 R. R. 579. See *Cannan* v. *Hartley*, (1850) 9 C. B. 634; 19 L. J. C. P. 323; 82 R. R. 478; *Oastler* v. *Henderson*, (1877) 46 L. J. Q. B. 607; 2 Q. B. D. 575.

(*y*) *Lyon* v *Reed*, (1844) 13 M. & W. 309, 310; 13 L. J. Ex. 377; 67 R. R. 593.

(*z*) *Gore* v. *Wright*, (1838) 8 A. & E. 118; 7 L. J. Q. B. 147; 47 R. R. 520.

(*a*) (1818) 2 Stark. 408.

(*b*) (1843) 6 Ir. L. R. 131

(*c*) *Nickells* v. *Atherstone*, *supra.*

(*d*) *Davison* v. *Gent*, *supra.*

or incorporeal hereditaments, which pass only by deed, are disposed of, or its extension to cases where corporeal estates are dealt with by the consent of the tenant, but where no actual change of possession has taken place, would certainly let in all the dangers for avoiding which the statute was passed; and here Lord Wensleydale is quite right in observing, that if this were the law, it would very seriously affect titles to long terms of years; mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from the mortgagor to a third person (*e*). However, as this is not the law at present (*f*), nothing further need be said on the subject.

§ 1013. A surrender by operation of law may also be effected under the provisions of particular Acts of Parliament. For instance, the Bankruptcy Act, 1914, empowers the trustee of a bankrupt lessee to relieve himself from all responsibility under the lease, by simply disclaiming it in writing under his hand (*g*), provided he do so with the leave (*h*) of the Court, within twelve months after his appointment, and within twenty-eight days after the lessor has applied to him to decide whether he will disclaim or not; and upon the execution of such disclaimer (*i*) the lease is deemed to have been surrendered on the date of the disclaimer, and the lessor is deemed to be a creditor of the bankrupt to the extent of any injury he may have sustained by the operation of this enactment, and he may prove the same as a debt under the bankruptcy (*k*). The trustee of a bankrupt may, in like manner, get rid of any shares or stock in companies, unprofitable contracts, or unsaleable property, acquired by him under the Bankruptcy Act, and this, too, notwithstanding he may have taken possession of such property, or exercised any act of ownership over it (*l*). Somewhat similar

(*e*) *Lyon* v. *Reed*, *supra*.

(*f*) *Id.* 310, as to estates lying in grant; *Doe* v. *Johnston*, (1825) M'Clel. & Y. 141, as to the assent of the tenant, when not coupled with change of possession; recognised in *Dodd* v. *Acklom*, (1843) 6 Man. & G. 679, 682; 13 L. J. C. P. 11; 64 R. R. 838. In *Walker* v. *Richardson*, (1857) 2 M. & W. 882; 6 L. J. Ex. 229; 46 R. R. 782, there was a lease of tolls, but the point that this was a right which lay in grant was never taken.

(*g*) 4 & 5 G. 5, c. 59, s. 54. A trustee, who has taken possession of the leasehold property of the bankrupt, cannot divest himself of personal liability to the landlord for the rent, except in the mode indicated in the text. *In re Solomon*, *ex parte Dressler*, (1878) 9 Ch. D. 252; 48 L. J. Bk. 20. See, also, *Wilson* v. *Wallani*, (1880) 5 Ex. D. 155; 49 L. J. Ex. 437; and *Lowrey* v. *Barker*, (1880) 5 Ex. D. 170; 49 L. J. Ex. 433.

(*h*) 4 & 5 G. 5, c. 59, s. 54 (3). Leave to disclaim is not required in all cases. See Bankruptcy Rules, R. 276.

(*i*) But this disclaimer will not affect the rights of third parties; *Ex parte Walton*, *Re Levy*, (1881) 17 Ch. D. 756; 50 L. J. Ch. 657. See, also, 4 & 5 G. 5, c. 59, s. 54.

(*k*) 4 & 5 G. 5, c. 59, s. 54 (8); *In re Hide*, (1871) L. R. 7 Ch. 28; 41 L. J. Bk. 5. A trustee, after disclaimer, cannot remove fixtures, *In re Lavies*, *ex parte Stephens*, (1877) 47 L. J. Bk. 22; 7 Ch. D. 127. See *In re Roberts*, *Ex parte Brook*, (1879) 10 Ch. D. 100; 48 L. J. Bk. 22.

(*l*) 4 & 5 G. 5, c. 59, s. 54.

provisions will also be found in the Irish Bankrupt and Insolvent Act, 1857 (*m*), and the Bankruptcy, Ireland, Amendment Act, 1872 (*n*). So, under the Building Societies Act, 1874, the society may indorse on any mortgage given to them by a member a receipt under their seal, and countersigned by the secretary or manager, and such receipt will have the effect of vacating the security, and of vesting the property comprised therein in the party entitled to the equity of redemption, without any reconveyance (*o*). The Industrial and Provident Societies Act, 1893 (*p*), and the Friendly Societies Act, 1896 (*q*), also contain similar enactments.

§ 1014. It may here be noticed that the law no longer allows any *merger* by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity (*r*).

§ 1015. With respect to *assignments by operation of law*, these may be effected in a variety of ways. For instance, when a lessor owner in fee dies intestate, the reversion, since the Land Transfer Act, 1897 (*s*), vests in his legal personal representative, and when a lessee dies intestate, the lease vests in his administrator, by operation of law. Nay, as against himself, even an executor *de son tort* may be treated as the assignee of a lease (*t*); and in all these cases, when an action is brought against the legal personal representative of the lessee, or executor *de son tort*, it will probably be sufficient to charge in the statement of claim that the reversion or lease respectively came to the defendant "by assignment thereof then made" (*u*). So, by virtue of the Conveyancing Act, 1881, an estate or interest of inheritance in any hereditaments will, on the death of the trustee or mortgagee, notwithstanding any testamentary disposition, vest, like a chattel real, in his legal personal representative (*v*). So, the chattels real of any woman married before the 9th of August, 1870 (*x*), or even between that date and the 1st of January, 1883 (*y*), may be said, in the absence of

(*m*) 20 & 21 V. c. 60, ss. 271, 272.
(*n*) 35 & 36 V. c. 58, ss. 97, 98.
(*o*) 37 & 38 V. c. 42, s. 42.
(*p*) 56 & 57 V. c. 39, s. 43.
(*q*) 59 & 60 V. c. 25, s. 53 (1).
(*r*) 36 & 37 V. c. 66, s. 25, sub-s. 4; 40 & 41 V. c. 57, s. 28, sub-s. 4, Ir.
(*s*) 60 & 61 V. c. 65.
(*t*) See, however, *Stratford-upon-Avon Corporation* v. *Parker*, [1914] 2 K. B. 562; 83 L. J. K. B. 1309.
(*u*) *Paull* v. *Simpson*, (1846) 9 Q. B. 365; 15 L. J. Q. B. 382; 72 R. R. 294; *Derisley* v. *Custance*, (1790) 4 T. R. 75.
(*v*) 44 & 45 V. c. 41, s. 30.
(*x*) When the Married Women's Property Act, 1870, 33 & 34 V. c. 93, came into operation.
(*y*) When the Married Women's Property Act, 1882, 45 & 46 V. c. 75, came into operation.

a settlement, to have been assigned to her husband by operation of law (*z*); though women married since the latter date are entitled to hold as their separate estate all the real and personal property belonging to them at the time of marriage (*a*). When any person is adjudged a bankrupt, his property, whether real or personal, in or out of England, present or future, vested or contingent (*b*), becomes vested, without any deed of assignment or conveyance, in the trustee upon his appointment (*c*); and on the death, resignation, or removal of any such trustee, and the appointment of another in his stead, a similar vesting takes place (*d*). So, where an official receiver is removed, dies, or resigns, all estates, rights, and powers, vested in him, shall, without any conveyance or transfer, vest in such official receiver as the Board of Trade may appoint (*e*). So, under the Friendly Societies Act, 1896, upon the death, resignation or removal of a trustee, the property vested in him vests in his successor without conveyance or assignment (*f*). So, upon the appointment of an administrator of convict's property, all the estate of the convict therein becomes vested in such official (*g*), and remains so vested till the expiration of the sentence, when it revests in the convict or his representative (*h*). It only remains to add, that a parol assignment by a sheriff of leasehold premises, taken in execution under a *fieri facias*, is void at law, though the assignee has entered and paid rent to the head landlord; and, consequently, the execution debtor may still regain possession of the premises in an action to recover land against the assignee (*i*), unless the latter pleads the facts by way of defence on equitable grounds, in which event he may possibly be enabled to defeat his opponent.

§ 1016 (*k*). The Statute of Frauds further requires that the declaration or creation of *trusts* of land shall be manifested by some writing, signed by the party, "who is by law enabled to declare such trust" (*l*); and that all grants and assignments of any such trust shall also be in

(*z*) See *Ashworth* v. *Outram*, (1877) 5 Ch. D. 923; 46 L. J. Ch. 687.

(*a*) 45 & 46 V. c. 75, ss. 1, 2.

(*b*) 4 & 5 G. 5, c. 59, s. 167. See *Stanton* v. *Collier*, (1854) 3 E. & B. 274; 23 L. J. Q. B. 116; 97 R. R. 465; *Beckham* v. *Drake*, (1847) 2 H. L. C. 579; 81 R. R. 301; *Rogers* v. *Spence*, (1846) 12 Cl. & F. 700; 69 R. R. 169; *Herbert* v. *Sayer*, (1844) 5 Q. B. 965; 12 L. J. Q. B. 286; *Jackson* v. *Burnham*, (1852) 8 Ex. 173; 22 L. J. Ex. 13; 91 R. R. 421.

(*c*) 4 & 5 G. 5, c. 59, s. 53. See, as to the Irish law, 20 & 21 V. c. 60, ss. 267, 268.

(*d*) 4 & 5 G. 5, c. 59, s. 53 (3). See, as to the Irish law, 20 & 21 V. c. 60, ss. 267, 268; 35 & 36 V. c. 58, s. 121 (5).

(*e*) Bankruptcy Rules, R. 307, sub-s. 2.

(*f*) 59 & 60 V. c. 25, s. 50.

(*g*) 33 & 34 V. c. 23, s. 10.

(*h*) S. 18.

(*i*) *Doe* v. *Jones*, (1842) 9 M. & W. 372; 11 L. J. Ex. 50; 60 R. R. 765.

(*k*) Gr. Ev. § 266, in part.

(*l*) These words refer to the *beneficial*, and not to the mere *legal*, owner of the estate. *Tierney* v. *Wood*, (1854) 19 Beav. 330; 23 L. J. Ch. 895; 105 R. R. 164; *Kronheim* v. *Johnson*, (1877) 7 Ch. D. 60, per Fry, J.; 47 L. J. Ch. 132.

writing, signed in the same manner (*m*). The statute does not require that the trust itself should be created by writing; but only that it should be *manifested* by writing; plainly meaning that documentary evidence should be forthcoming, to prove first the existence, and next the nature of the trust (*n*). A letter acknowledging the trust, and *à fortiori*, an admission in an answer in Chancery, has therefore been deemed sufficient to satisfy the statute (*o*). An employment by a person of another to bid for him at an auction is within the statute (*p*). Declarations of trust otherwise than of land are not required to be so evidenced (*q*), and may be shown in various ways (*r*).

§ 1017 (*s*). *Resulting trusts*, or those which arise by implication of law, are specially excepted from the operation of the Act (*t*). Trusts of this sort arise in three cases. First, where the estate is purchased in the name of one person, but the purchase-money is paid by another (*u*);—and here, it matters not whether the legal estate be freehold, copyhold, or leasehold; whether it be taken in the names of the purchaser and others jointly, or in the names of others, without that of the purchaser; or in one name, or in several, jointly, or successive; but in all cases the trust will result to the man who advances the purchase-money (*v*), unless such a resulting trust would break in

(*m*) 29 C. 2, c. 3, s. 7, enacts, that "all declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." S. 8 provides, that "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding." S. 9 enacts, that "all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting the same, or by such last will or devise, or else shall likewise be utterly void and of none effect." See the corresponding Irish Act of 7 W. 3, c. 12, ss. 10, 11, 12.

(*n*) *Smith* v. *Matthews*, (1861) 30 L. J. Ch. 445. See *Booth* v. *Turle*, (1873) L. R. 16 Eq. 182.

(*o*) *Forster* v. *Hale*, (1798) 3 Ves. 696, 707; 4 R. R. 128; *Randall* v. *Morgan*, (1805) 12 Ves. 67; 8 R. R. 289; Rob. on Frauds, 95; 3 Sug. V. & P. 252, 700; 4 Kent, Com. 305.

(*p*) *James* v. *Smith* (1890) 63 L. T. 524.

(*q*) See, as to these, notes in White and Tudor's Leading Cases; as to executed and executory trusts, to *Glenorchy* v. *Bosville*, (1733) Cases Temp, Talbot 3; as to voluntary trusts, to *Ellison* v. *Ellison*, (1802) 6 Ves. 656; 6 R. R. 19; as to constructive trusts, to *Keech* v. *Sandford* (1776) Sel. Cases in Ch. 61; as to resulting trusts, to *Dyer* v. *Dyer* (1788) 2 Cox C. C. 92; 2 R. R. 14.

(*r*) *In re Vernon, Ewens & Co.* (1886) 32 Ch. D. 165; 56 L. J. Ch. 12.

(*s*) Gr. Ev. § 266, in part.

(*t*) See last note but four.

(*u*) *Lloyd* v. *Spillet*, (1740) 2 Atk. 150, per Ld. Hardwicke.

(*v*) *Dyer* v. *Dyer*, *supra*; 3 Sug. V. & P. 252, 701; *Wray* v. *Steele*, (1814) 2 Ves. & B. 388; 13 R. R. 124; *Baxter* v. *Brown*, (1845) 7 Man. & G. 215; 14 L. J. C. P. 193; 66 R. R. 706.

upon the policy of some statute (*x*), or unless the purchase be effected by a father (*y*), or perhaps a mother (*z*), in the name of an unprovisioned child, legitimate or illegitimate (*a*), or in the joint names of the purchaser and such child (*b*), or of such child and another person (*c*). In the case of the purchase by a parent, the trust, in the absence of clear evidence to the contrary (*d*),—and the parent's subsequent declarations cannot furnish such evidence (*e*),—will not be deemed a resulting trust for the purchaser, but a gift or advancement for the child (*f*); because parents are bound in conscience to provide for their children (*g*). Resulting trusts will arise, secondly, where a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and thirdly, in cases of fraud (*h*).

§ 1018. In all these cases it appears now to be generally conceded, that parol evidence,—though received with great caution, and not deemed sufficient unless of a clear character (*i*),—is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from which a trust may legally result (*k*); and that it makes no difference as to its admissibility whether the nominal purchaser be living or dead (*l*). It has, indeed, been doubted whether

(*x*) *Ex parte Houghton*, (1810) 17 Ves. 251; 11 R. R. 73; *Redington* v. *Redington*, (1794) 3 Ridg. P. C. 106.

(*y*) The doctrine probably extends to a purchase by any person who stands in *loco parentis*: *Powys* v. *Mansfield*, (1836) 3 Myl. & Cr. 359; 7 L. J. Ch. 9; 45 R. R. 277, per Ld. Cottenham.

(*z*) But, in the case of a mother, the equitable presumption must be supported by some evidence of intention, *Bennet* v. *Bennet*, (1870) 10 Ch. D. 474, per Jessel, M.R., commenting on *Sayre* v. *Hughes*, (1868) 5 Eq. 376; 37 L. J. Ch. 401; and *In re De Visme*, (1864) 2 De Gex, J. & S. 17; 33 L. J. Ch. 332; 139 R. R. 7.

(*a*) *Beckford* v. *Beckford*, (1774) Lofft. 490; 3 Sug. V. & P. 262. See *Soar* v. *Foster*, (1858) 4 K. & J. 152; 116 R. R. 280; *Tucker* v. *Burrow*, (1865) 34 L. J. Ch. 478; 2 H. & M. 515; 144 R. R. 245.

(*b*) *Fox* v. *Fox*, (1863) 15 Ir. Ch. R. 89; *Sidmouth* v. *Sidmouth*, (1840) 2 Beav. 447; 9 L. J. Ch. 282; 50 R. R. 235.

(*c*) *Lamplugh* v. *Lamplugh*, (1709) 1 P. Wms. 112.

(*d*) *Stock* v. *M'Avoy*, (1872) 15 Eq. 55; 42 L. J. Ch. 230.

(*e*) *O'Brien* v. *Sheil*, (1873) I. R. 7 Eq. 255.

(*f*) See *Forrest* v. *Forrest*, (1865) 34 L. J. Ch. 428; 146 R. R. 685; *Hepworth* v. *Hepworth*, (1870) 11 Eq. 10; 40 L. J. Ch. 111.

(*g*) 3 Sug. V. & P. 262, 703. See *Devoy* v. *Devoy*, (1858) 2 Sm. & G. 403; *Jeans* v *Cooke*, (1857) 24 Beav. 513; 27 L. J. Ch. 202; 116 R. R. 202; *Dumper* v. *Dumper*, (1862) 3 Giff. 583; 133 R. R. 187; *Williams* v. *Williams*, (1863) 32 Beav. 370; 138 R. R. 766.

(*h*) *Lloyd* v. *Spillet*, (1740) 2 Atk. 150, per Ld. Hardwicke.

(*i*) *Wilkins* v. *Stephens*, (1842) 1 Y. & C. C. C. 431; *Groves* v. *Groves*, (1829) 3 Y. & J. 170; 32 R. R. 782.

(*k*) *Marshal* v. *Crutwell*, (1875) 20 L. R. Eq. 328; 44 L. J. Ch. 504.

(*l*) 3 Sug. V. & P. 257—260, 701; 2 Story, Eq. Jur. § 1201, n.; *Lench* v. *Lench*, (1805) 10 Ves. 517; 3 Law Mag. 131—139; 4 Kent, Com. 305; *Boyd* v. *M'Lean*, (1815) 1 Johns. Ch. R. 582; *Pritchard* v. *Brown*, (1828) 4 New Hamps. 307; *Goodwin* v. *Hubbard*, (1818) 15 Mass. 218, n. by Mr. Rand.

parol evidence is admissible against the answer of the trustee denying the trust (*m*); but no good reason can be given for entertaining such a doubt (*n*). As a resulting trust may be established by parol evidence, it may also, notwithstanding the statute, be rebutted by the same species of proof; and, therefore, parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially (*o*). Nay, if the circumstances be such as to render it probable that a gift was really intended, the presumption of a resulting trust may be effectually rebutted even by the sole testimony of the party interested in supporting the gift (*p*).

§ 1019. Section 4 of the same statute (*q*),—which, like section 1, as before stated (*r*), would seem to be inapplicable to deeds (*s*),—enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or any person upon any special promise to answer for the debt, default, or miscarriage of another; or upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within one year from the making thereof; unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised (*t*).

§ 1020. The provisions of section 17 of the Statute of Frauds have been repealed by the Sale of Goods Act, 1893 (*u*). The last-mentioned Act provides (*v*) that the contract for the sale of any goods (*x*) of the

(*m*) 3 Sug. V. & P. 256, 257, 702.

(*n*) 3 Law Mag. 136—138; *Bartlett* v. *Pickersgill*, (1759) 4 East, 577, n., per Henley, L.K.

(*o*) 3 Sug. V. & P. 260; *Edwards* v. *Edwards*, (1836) 2 Y. & C. 123; 6 L. J. Ex. Eq. 79; 47 R. R. 372; *Brady* v. *Cubitt*, (1778) 1 Doug. 31, 39; *Beecher* v. *Major*, (1865) 2 Dr. & Sm. 431; *Goodright* v. *Hodges*, (1773) 2 East, 534, n.

(*p*) *Fowkes* v. *Pascoe*, (1875) L. R. 10 Ch. 343; 44 L. J. Ch. 367.

(*q*) 29 C. 2, c. 3; s. 7 of 7 W. 3, c. 12, Ir., corresponds with this sect.

(*r*) *Ante*, § 1001.

(*s*) *Cherry* v. *Heming*, (1849) 4 Ex. 631; 19 L. J. Ex. 63; 80 R. R. 733.

(*t*) As to the meaning of these last words, see *Norris* v. *Cooke*, (1857) 30 L. T. 224 (Ir.); *Smith* v. *Webster*, (1876) 45 L. J. Ch. 528; 3 Ch. D. 49; *Griffiths Cycle Corpn.* v. *Humber & Co.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959.

(*u*) 56 & 57 V. c. 71, s. 60.

(*v*) S. 4 (1).

(*x*) The Statute of Frauds here added, "wares or merchandise." By its interpretation clause (s. 62), the word "goods" in the Sale of Goods Act includes "all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

value (*y*) of ten pounds or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party (*z*) to be charged, or his agent (*a*) in that behalf. It is expressly provided (*b*) that these provisions of the Sale of Goods Act shall extend to every such contract, "notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

§ 1021. The meaning of section 4 of the Statute of Frauds is substantially the same (*c*) as that of section 4 of the Sale of Goods Act. To satisfy either enactment, the *consideration* for the agreement in the one case, and for the bargain (*d*) in the other, must,—except in the case of a special promise made by one person to answer for the debt, default, or miscarriage of another (*e*),—appear expressly or impliedly in writing signed by the party to be charged, or by his agent. This rule applies, not only to bargains for the sale of goods, to agreements upon consideration of marriage (*f*), to contracts for the sale or lease of

(*y*) The Statute of Frauds here said, "*for the price* of ten pounds or upwards." The changed language is not important, in view of the change made by Lord Tenterden's Act as long ago as 1828, and sub-s. 2 of s. 4.

(*z*) A. signed a contract to buy a ship of B. B. altered the contract, signed it, and returned it to A., who thereupon assented by parol to the alteration, but did not re-sign the document. Held, that the statute was satisfied: *Steward* v. *Eddowes*, (1874) L. R. 9 C. P. 311; 43 L. J. C. P. 204.

(*a*) One party to a contract cannot sign the name of the other as his agent, so as to bind him within the statute; *Sharman* v. *Brandt*, (1871) L. R. 6 Q. B. 720; 40 L. J. Q. B. 312. Neither, in the absence of express authority, can the vendor's traveller sign the bargain in the purchaser's name as his agent. *Murphy* v. *Boese*, (1875) L. R. 10 Ex. 126; 44 L. J. Ex. 40. See *post*, § 1109.

(*b*) 56 & 57 V. c. 71, repealing (s. 60) and re-enacting (s. 4, sub-s. 2) a similar provision originally contained in Lord Tenterden's Act of 1828 (9 G. 4, c. 14, s. 7), and extended to Ireland by 7 W. 3, c. 12, s. 21.

(*c*) *Kenworthy* v. *Schofield*, (1824) 2 B. & C. 947.

(*d*) The price must be stated if actually agreed: *Elmore* v. *Kingscote*, (1826) 5 B. & C. 583; 29 R. R. 341; but not if the sale is for an implied reasonable price: *Hoadley* v. *M'Laine*, (1834) 10 Bing. 482; 3 L. J. C. P. 162; 38 R. R. 510; *Egerton* v. *Mathews*, (1805) 6 East, 307; 8 R. R. 489. See *Jenkins* v. *Reynolds*, (1821) 3 B. & B. 21; *Hunt* v. *Hunt*, (1809) 5 Mass. 360 (Am.). By the sale of Goods Act it is provided, s. 8; "(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

(*e*) As to this see the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 3, cited *post*, § 1030.

(*f*) See *Saunders* v. *Cramer*, (1842) 3 Dr. & W. 87.

lands, and to agreements not to be performed within a year (*g*); but also to special promises made by executors or administrators to answer damages out of their own estate. The judges have established this doctrine with the view of effectuating the object of the statute; but those who have watched its operation cannot fail to have observed, that, instead of preventing, it has increased to a great extent, the commission of fraud.

§ 1022. At present, however, the rule prevails in full force both in England and in Ireland, the only recognised qualification of it being that the consideration need not be stated on the face of the written memorandum in express terms; but that it will suffice if it can be collected, not indeed by mere conjecture however plausible (*h*), but by fair and reasonable, if not necessary, intendment from the whole tenor of the writing (*i*).

§ 1024. It is further essential to the validity of the written document, that all the material terms of the contract (*k*), and the promise (*l*), should be stated therein, either directly or by reference (*m*). For example, an agreement for a lease must contain all the essential terms of the lease; and therefore, if the court cannot discover from it at what date the tenancy is to commence, the document will be rejected as not satisfying the requirements of the statute (*n*). Still any memorandum will suffice, which, employing mere general language, without condescending to minute particulars, contains all that leads to future certainty. For instance, if a man undertakes in writing to purchase a particular article at a named price, this will satisfy the statute, though it be agreed at the same time that the article in question shall have some alteration or addition made to it before delivery (*o*).

(*g*) *Lees* v. *Whitcomb*, (1828) 5 Bing. 34; 6 L. J. (O.S.) C. P. 213; 30 R. R. 539; *Sykes* v. *Dixon*, (1839) 9 A. & E. 693; 8 L. J. Q. B. 102; 48 R. R. 644; *Sweet* v. *Lee*, (1841) 3 Man. & G. 466; 60 R. R. 546.

(*h*) *Hawes* v *Armstrong*, (1835) 1 Bing. N. C. 765; *James* v. *Williams*, (1834) 5 B. & Ad. 1109; 3 L. J. K. B. 97; *Raikes* v. *Todd*, (1838) 8 A. & E. 855; 8 L. J. Q. B. 35; 47 R. R. 751.

(*i*) *Joint* v. *Mortyn*, (1823) 2 Fox & Sm. 4; *Saunders* v. *Cramer*, (1842) 3 Dr. & W. 87; *Price* v. *Richardson*, (1845) 15 M. & W. 540; 15 L. J. Ex. 345; *Caballero* v. *Slater*, (1854) 14 C. B. 300; 23 L. J. C. P. 677; 98 R. R. 637.

(*k*) *Archer* v. *Baynes*, (1850) 5 Ex. 625; 20 L. J. Ex. 54; 82 R. R. 792; *Wood* v. *Midgley*, (1854) 5 De Gex, M. & G. 41; 23 L. J. Ch. 553; 104 R. R. 18; *Holmes* v. *Mitchell*, (1859) 28 L. J. C. P. 301; 7 C. B. (N.S.) 361; 121 R. R. 536.

(*l*) *Carroll* v. *Cowell*, (1838) 1 Jebb. & Sy. 43; *Morgan* v *Sykes*, cited in argument in *Coats* v. *Chaplin*, (1842) 3 Q. B. 486; 11 L. J. Q. B. 315; 61 R. R. 267.

(*m*) "I admit that an agreement is not perfect, unless in the body of it, or by necessary inference, it contains the names of the two contracting parties, the subject matter of the contract, the consideration, and the promise," per Tindal, C. J., in *Laythoarp* v. *Bryant*, (1836) 2 Bing. N. C. 742; 5 L. J. C. P. 217; 42 R. R. 709.

(*n*) *Marshall* v. *Berridge*, 51 L. J. Ch. 329; (1882) 19 Ch. D. 223; *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41; 61 L. J. Ch. 707.

(*o*) *Sarl* v. *Bourdillon*, (1856) 26 L. J. C. P. 78; 1 C. B. (N.S.) 188; 26 L. J. C. P. 78; 107 R. R. 624.

So, when an auctioneer had signed a memorandum, acknowledging the receipt from A. B. of £21 as deposit on *property* belonging to C. D., purchased at £420 on a certain day at a named place, this was held to be a sufficient description of a house that had been sold by auction, parol evidence being admissible to identify the particular premises (*p*). Where by a contract in writing a vendor agreed to sell and a purchaser to buy "twenty-four acres of land freehold, at T., in the parish of D.," parol evidence was admitted to show what particular land was the subject-matter of the contract (*q*). Again, if a party agrees to pay rent for a certain farm at a specified sum per acre (*r*), or, in consideration of forbearance, to pay for all goods supplied to a third party during the antecedent month, or even to liquidate his *debt*, the written memorandum need not specify the number of the acres, the quantity of the goods, or the amount of the debt; because each of these facts is capable of being ascertained with certainty by subsequent inquiry (*s*). If it be contended, that in the last instance given the memorandum is insufficient, as two or more debts may be owing from the third party, and it does not appear to which of these the writing applies, the answer is clear;—namely, that the court will not presume the existence of more debts than one, but will call upon the party impeaching the document to furnish proof of that fact, and, consequently, in the absence of such proof, the maxim, *de non apparentibus et de non existentibus eadem est ratio*, will be held to apply (*t*). Again, the omission of the particular mode (*u*) or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale (*v*); and a written order for goods "on moderate terms" will satisfy the statute (*x*), though, if a specific price be agreed upon, it must be mentioned in the contract (*y*). Where the memorandum of a contract for the sale of goods omitted all reference to the price, but owing to part delivery no memorandum was necessary, the court allowed the plaintiff to establish by parol evidence the price on which the parties had verbally agreed (*z*).

(*p*) *Shardlow* v. *Cottcrill*, (1881) 51 L. J. Ch. 353; 20 Ch. D. 90.

(*q*) *Plant* v. *Bourne*, [1897] 2 Ch. 281; 66 L. J. Ch. 643.

(*r*) *Shannon* v *Bradstreet*, (1803) 1 Sch. & Lef. 73; 9 R. R. 11.

(*s*) *Bateman* v. *Phillips*, (1812) 15 East, 272; *Shortrede* v. *Cheek*, (1834) 1 A. & E. 58, 60; 3 L. J. K. B. 125; 40 R. R. 258; *Bleakley* v. *Smith*, (1840) 11 Sim. 150; 54 R. R. 342; see *post*, § 1030.

(*t*) *Shelton* v. *Braithwaite*, (1841) 7 M. & W. 437; 10 L. J. Ex. 218; 56 R. R. 755; *Shortrede* v. *Cheek*, *supra*; *Dobell* v. *Hutchinson*, (1835) 3 A. & E. 371; 4 L. J. K. B. 201; 42 R. R. 408; *Powell* v. *Dillon*, (1814) 2 Ball & B. 420; *Spickernell* v. *Hotham*, (1854) 1 Kay, 669; 101 R. R. 804.

(*u*) *Sarl* v. *Bourdillon*, *supra*.

(*v*) *Valpy* v. *Gibson*, (1847) 4 C. B. 864; 16 L. J. C. P. 241; 72 R. R. 740.

(*x*) *Ashcroft* v. *Morrin*, (1842) 4 Man. & G. 450; 11 L. J. C. P. 265; 61 R. R. 559.

(*y*) *Elmore* v. *Kingscote*, (1826) 5 B. & C. 583; 29 R. R. 341; *Goodman* v. *Griffiths* (1857) 1 H. & N. 574; 26 L. J. Ex. 145; 108 R. R. 728.

(*z*) *Jeffcott* v. *North British Oil Co.*, (1873) I. R. 8 C. L. 17.

§ 1025. The names of both contracting parties must also be specified, either nominally, or by description, or by reference, in the memorandum (*a*), though on this point the courts show little inclination to enforce any strict rule. For instance, in two sales of land by auction, where the particulars stated that the property was put up for sale "by direction of the proprietor," the requirements of the fourth section of the Act were held to be satisfied, so far as the description of the vendor was concerned (*b*); and the same point has been ruled on other occasions, in one of which the vendor was simply described as "the executor of Admiral F." (*c*), in another as "trustee selling under a trust for sale," (*d*) in another as "landlord" (*e*). The description "owner" has also been held to be sufficient (*f*), and so has the word "tenant" where it can reasonably be taken that one of the parties signed as such (*g*). An agreement for a lease, which did not mention the name of the tenant, but commenced "in consideration of you having this day paid me the sum of £50" was held to specify sufficiently the proposed tenant upon its being proved who in fact paid the £50 (*h*). In a case where the defendant, having purchased various articles in the plaintiff's shop, signed his name and address in the "order-book," at the head of an entry which specified the articles and the prices, the statute was held to be satisfied, as the plaintiff's name was printed on the fly-leaf of the book, and the defendant might have seen it had he looked for it (*i*).

§ 1026 (*k*). The written evidence required by this and similar statutes, need not be comprised in a single document, or be drawn up in any particular form. A draft, if duly signed, will suffice, even

(*a*) *Champion* v. *Plummer*, (1805) 1 Bos. & P. N. R.; 8 R. R. 795, 252; *Vandenbergh* v. *Spooner*, (1866) L. R. 1 Ex. 316; 35 L. J. Ex. 201; 143 R. R. 760; *Williams* v. *Byrnes*, (1863) 1 Moore, P. C. 154; 138 R. R. 487; *Warner* v. *Willington*, (1856) 3 Drew., 523; 25 L. J. Ch. 662; 106 R. R. 416; *Wheeler* v. *Collier*, (1827) M. & M. 125; *Skelton* v. *Cole*, (1857) 4 De Gex & J. 587; *Williams* v. *Lake*, (1859) 29 L. J. Q. B. 1; 2 E. & E. 349; 119 R. R. 758; *Newell* v. *Radford*, (1867) L. R. 3 C. P. 52; 37 L. J. C. P. 1; *Boyce* v. *Green*, (1826) Batty, 608; *Williams* v. *Jordan*, (1877) 46 L. J. Ch. 681; 6 Ch. D. 517.

(*b*) *Rossiter* v. *Miller*, (1878) 3 App. Cas. 1124; 48 L. J. Ch. 10; *Sale* v. *Lambert*, (1874) 18 Eq. 1; 43 L. J. Ch. 470. See also *Commins* v. *Scott*, (1875) L. R. 20 Eq. 11; 44 L. J. Ch. 563.

(*c*) *Hood* v. *Ld. Barrington*, (1868) L. R. 6 Eq. 218.

(*d*) *Catling* v. *King*, (1877) 46 L. J. Ch. 384; 5 Ch. D. 660.

(*e*) *Coombs* v. *Wilkes*, [1891] 3 Ch. 77; 61 L. J. Ch. 42. It may be questioned whether the cases above cited dispose of a case in which it was decided that the mere term "vendor" was not a sufficient description: *Potter* v. *Duffield*, (1874) L. R. 18 Eq. 4; 43 L. J. Ch. 472. See also *Thomas* v. *Brown*, (1876) 1 Q. B. D. 714; 45 L. J. Q. B. 811.

(*f*) *Butcher* v. *Nash*, (1889) 61 L. T. 72.

(*g*) *Stokell* v. *Niven*, (1889) 61 L. T. 18.

(*h*) *Carr* v. *Lynch*, [1900] 1 Ch. 613; 69 L. J. Ch. 345.

(*i*) *Sarl* v. *Bourdillon*, *supra*. See, also, *Dewar* v. *Mintoft*, [1912] 2 K. B. 373; 81 L. J. K. B. 885.

(*k*) Gr. Ev. § 268, in part.

where a more formal document was intended (*l*). It will suffice if the contract can be plainly made out in all its terms from any writings of the party (*m*), or even from his correspondence (*n*), provided such writings or correspondence contain internal evidence connecting them together (*o*), and an envelope in which a letter has been enclosed is sufficiently connected with the letter to supply the name of one of the parties to the contract (*p*). A signed letter will be sufficient, though it does not contain in itself any one of the terms of the agreement, if it distinctly refers to and recognises any writing which does contain them all (*q*): for, in such case the well-known maxim of law, "*verba illata inesse videntur*," will be held to apply (*r*). A written memorandum, however, which in any material point differs from the terms of the verbal contract, or which either introduces any new term, or leaves any material term open to doubt (*s*), will not satisfy the requirements of the statute (*t*). Neither will a letter suffice, which, instead of ratifying, repudiates the written but unsigned contract relied on (*u*); though, if the letter itself enumerates all the essential terms of the bargain, it will be sufficient, notwithstanding it may also contain some reason for the non-acceptance of the goods, which form the subject-matter of the contract (*v*). It is now settled law that a

(*l*) *Gray* v. *Smith*, (1890) 43 Ch. D. 208; 59 L. J. Ch. 145. But see *Bristol Aerated Bread Co.* v. *Maggs*, (1890) 44 Ch. D. 616; 59 L. J. Ch. 472; *Bolton* v. *Lambert*, (1889) 41 Ch. D. 295; 58 L. J. Ch. 425.

(*m*) See *Shardlow* v. *Cotterill*, (1881) 51 L. J. Ch. 353; 20 Ch. D. 90.

(*n*) *Bellamy* v. *Debenham*, (1890) 45 Ch. D. 481; *Allen* v. *Bennet*, (1810) 3 Taunt. 169; 12 R. R. 633; *Jackson* v. *Lowe*, (1822) 1 Bing. 9; 25 R. R. 567; *Phillimore* v. *Barry*, (1808) 1 Camp. 513; 10 R. R. 742; *Warner* v. *Willington*, *supra*; *Skelton* v. *Cole*, *supra*; *Dewar* v. *Mintoft*, *supra*.

(*o*) *Secus*, if not connected together: *Taylor* v. *Smith*, (1892) 61 L. J. Q. B. 231; *Potter* v. *Peters*, (1895) 64 L. J. Ch. 357.

(*p*) *Pearce* v. *Gardner*, (1897) 1 Q. B. 688; 66 L. J. Q. B. 457.

(*q*) *Dobell* v. *Hutchinson*, *supra*; *Jones* v. *Victoria Graving Dock Co.*, (1877) 46 L. J. Q. B. 219; 2 Q. B. D. 314; *Gibson* v. *Holland*, (1865) L. R. 1 C. P. 1; 35 L. J. C. P. 5; *Macrory* v. *Scott*, (1850) 5 Ex. 907; 20 L. J. Ex. 90; *Ridgway* v. *Wharton*, (1856) 6 H. L. C. 238; 27 L. J. Ch. 46; 108 R. R. 88; *Baumann* v. *James*, (1868) L. R. 3 Ch. 508; *Long* v. *Millar*, (1878) 48 L. J. Q. B. 596; 4 C. P. D. 450; *Cave* v. *Hastings*, (1881) 7 Q. B. D. 125; 50 L. J. Q. B. 575; *Crane* v. *Powell*, (1868) L. R. 4 C. P. 123; 38 L. J. M. C. 43; *Oliver* v. *Hunting*, (1890) 44 Ch. D. 205; 59 L. J. Ch. 255.

(*r*) See per Parke, B., in *Llewellyn* v. *Ld. Jersey*, (1843) 11 M. & W. 189; 12 L. J. Ex. 243; 63 R. R. 569.

(*s*) In *Hussey* v. *Horne-Payne*, (1878) 8 Ch. D. 670; 48 L. J. Ch. 846, the C.A. held that a proposal to sell, accepted "subject to the title being approved" was not sufficient acceptance; but in H.L. (1879) 4 App. Cas. 311 this was questioned by Lord Cairns.

(*t*) *Mahalen* v. *Dublin & Chap. Distillery Co.*, (1877) I. R. 11 C. L. 83.

(*u*) *Archer* v. *Baynes*, (1850) 5 Ex. 625; 20 L. J. Ex. 54; 82 R. R. 792; *Richards* v. *Porter*, (1827) 6 B. & C. 437; 5 L. J. (O.S.) K. B. 175; 30 R. R. 392; *Cooper* v. *Smith*, (1812) 15 East, 103; 13 R. R. 397. See *Goodman* v. *Griffiths*, (1857) 1 H. & N. 574; 26 L. J. Ex. 145; 108 R. R. 728; *Jackson* v. *Oglander*, (1865) 2 H. & M. 465; 144 R. R. 235.

(*v*) *Bailey* v. *Sweeting*, (1861) 30 L. J. C. P. 150; 9 C. B. (N.S.) 843; 127 R. R. 896; *Wilkinson* v. *Evans*, (1866) L. R. 1 C. P. 407; 35 L. J. C. P. 224; *Buxton* v.

simple acceptance by letter of a written offer to purchase may constitute a contract to sell, although it refers to the preparation of a more formal contract; unless, indeed, the reference be expressed in such language as to indicate an intention not to be bound by the bargain until the formal instrument be duly executed (*x*). Still, the entire contract must be collected from the writings (*y*); verbal testimony not being admissible to supply any defects or omissions in the written evidence (*z*). But, though parol evidence cannot be received to alter the terms of the written contract, or to supply any omissions in it, such evidence may be admitted to show the situation of the parties at the time the contract was made (*a*), or to identify any plans or other documents or things referred to in the contract (*b*); as also to explain the language employed (*c*), or, it seems, even to fix the date at which it was committed to writing (*d*).

§ 1027. Again, it does not signify to whom the memorandum which states the terms of the agreement is addressed, because the memorandum is not necessary to constitute the contract, but merely to furnish satisfactory proof of it. A letter, therefore, addressed to a third party (*e*), or a recital of the arrangement contained in the will of the party to be charged (*f*), or an answer to a bill in Chancery under

Rust, (1872) L. R. 7 Ex. 279; 41 L. J. Ex. 1; *Leather Cloth Co.* v. *Hieronimus*, (1875) L. R. 10 Q. B. 140; 44 L. J. Q. B. 54; *Munday* v. *Asprey*, (1880) 13 Ch. D. 855; 49 L. J. Ch. 216; *Elliott* v. *Dean*, (1884) Cab. & E. 283; *Dewar* v. *Mintoft*, [1912] 2 K. B. 373; 81 L. J. K. B. 885.

(*x*) *Bonnewell* v. *Jenkins*, (1878) 8 Ch. D. 70; 47 L. J. Ch. 758; *Crossley* v. *Maycock*, (1874) 43 L. J. Ch. 379; 18 Eq. 180; *Rossiter* v. *Miller*, (1878) 3 App. Cas. 1124; 48 L. J. Ch. 10; *Brien* v. *Swainson*, (1877) 1 L. R. Ir. 135; *Lewis* v. *Brass*, (1878) 3 Q. B. D. 667.

(*y*) See *Chinnock* v. *Lady Ely*, (1865) 4 De Gex, J. & S. 638; 146 R. R. 495; *Winn* v. *Bull*, (1877) 7 Ch. D. 29; 47 L. J. Ch. 139; *Rishton* v. *Whatmore*, (1878) 8 Ch. D. 467; 47 L. J. Ch. 629; *Dolling* v. *Evans*, (1867) 36 L. J. Ch. 474; *Nesham* v. *Selby*, (1872) L. R. 7 Ch. 406; 41 L. J. Ch. 551; *Peirce* v. *Corf*, (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

(*z*) *Boydell* v. *Drummond*, (1809) 11 East, 142; 10 R. R. 450; *Cox* v. *Middleton*, (1855) 2 Drew, 209; 23 L. J. Ch. 618; 100 R. R. 90; *Ridgway* v. *Wharton*, (1854) 3 De Gex, M. & G. 677; 98 R. R. 285; *Caddick* v. *Skidmore*, (1858) 2 De Gex & J 56; 27 L. J. Ch. 153; 119 R. R. 21; *Fitzmaurice* v. *Bayley*, (1857) 9 H. L. C. 78; 131 R. R. 48; *Clarke* v. *Fuller*, (1864) 16 C. B. (N.S.) 24; 139 R. R. 392; *Parkhurst* v. *Van Cortlandt*, (1814) 1 Johns. Ch. R. 280 (Am.); *Abeel* v. *Radcliff*, (1816) 13 Johns. 297 (Am.).

(*a*) *Sweet* v. *Lee*, (1841) 3 Man. & G. 466; 60 R. R. 546.

(*b*) *Horsfall* v. *Hodges*, (1824) 2 Coop. 115; *Cave* v. *Hastings*, (1881) 7 Q. B. D 125; 50 L. J. Q. B. 275.

(*c*) *Sweet* v. *Lee*, *supra*. See *Waldron* v. *Jacob*, (1871) I. R. 5 Eq. 131, where parol evidence was admitted to show what "this place" meant.

(*d*) *Edmunds* v. *Downes*, (1834) 2 Cr. & M. 459; 3 L. J. Ex. 98; 39 R. R. 813; *Hartley* v. *Wharton*, (1840) 11 A. & E. 934; 9 L. J. Q. B. 209; 52 R. R. 547; *Lobb* v. *Stanley*, (1844) 5 Q. B. 574; 13 L. J. Q. B. 117.

(*e*) *Longfellow* v. *Williams*, (1804) Pea. Ad. C. 225; *Rose* v. *Cunynghame*, (1805) 11 Ves. 550; *Gibson* v. *Holland*, (1865) L. R. 1 C. P. 1; 35 L. J. C. P. 5.

(*f*) *In re Hoyle*, *Hoyle* v. *Hoyle*, (1892) 41 W. R. 81; 62 L. J. Ch. 182

the old forms of pleading, or an affidavit in any legal proceeding (*g*), or written and signed instructions given to a telegraph clerk for transmission (*h*), or the minutes of a board meeting, signed by the Chairman (*i*); will suffice, provided the documents sufficiently refer to the terms of the original verbal promise; and even, where the party to be charged had attested a deed which recited the oral agreement, this was held to be sufficient, as it appeared that in fact he knew of the recital (*k*). But a written memorandum, made after the action is brought, will not satisfy the statute (*l*).

§ 1028. The *place of signature* is also immaterial, as the statute does not require that the writing should be *subscribed* by the party to be charged, but merely that it should be signed. If, therefore, a party, or his duly authorised agent (*m*), inserts his name, either at the beginning, or in the body, of a document, for the purpose of authenticating or governing every part of it, this will be equally valid with a signature at the foot (*n*); though in these cases it will always be a question for the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it (*o*). Where an agreement, drawn up by the secretary of one of the contracting parties, contained the names of both parties in the body of the instrument, but concluded "As witness our hands," and no signatures were subscribed, the court held that the statute was not satisfied, as it was obviously intended that the agreement should not be perfect till the names were added at the foot (*p*).

§ 1029. With respect to the *mode of signature*, it matters not whether the Christian name be set out at length or denoted by the initial, or omitted altogether (*q*); or that the letter is signed by the

(*g*) *Barkworth* v. *Young*, (1857) 26 L. J. Ch. 153. 158.

(*h*) *Godwin* v. *Francis*, (1870) 39 L. J. C. P. 121; L. R. 5 C. P. 295.

(*i*) *Jones* v. *Victoria Graving Dock Co.*, (1877) 46 L. J. Q. B. 219; 2 Q. B. D. 314.

(*k*) *Welford* v. *Beezley*, (1747) 1 Ves. Sen. 6.

(*l*) *Bill* v. *Bament*, (1841) 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658; *Lucas* v. *Dixon*, (1889) 22 Q. B. D. 357; 58 L. J. Q. B. 161.

(*m*) *Evans* v. *Hoare*, [1892] 1 Q. B. 593; 61 L. J. Q. B. 470.

(*n*) *Caton* v. *Caton*, (1867) L. R. 2 H. L. 127; 36 L. J. Ch. 886; *Lobb* v. *Stanley*, *supra*; *Johnson* v. *Dodgson*, (1837) 2 M. & W. 659; 6 L. J. Ex. 185; 46 R. R. 733; *Durrell* v. *Evans*, (1862) 31 L. J. Ex. 337; 1 H. & C. 174; 130 R. R. 446; *Knight* v. *Crockford*, (1794) 1 Esp. 190; 5 R. R. 729; *Lemayne* v. *Stanley*, (1681) 3 Lev. 1; *Ogilvie* v. *Foljambe*, (1817) 3 Mer. 53; 17 R. R. 13; *Saunderson* v. *Jackson*, (1800) 2 Bos. & P. 238; 5 R. R. 580; *Hammersley* v. *Baron de Biel*, (1845) 12 Cl. & F. 63; *Holmes* v. *Mackrell*, (1858) 3 C. B. (N.S.) 789; 111 R. R. 837; *Bleokley* v. *Smith*, (1840) 11 Sim. 150; 54 R. R. 342. See *post*, § 1075.

(*o*) *Johnson* v. *Dodgson*, *supra*.

(*p*) *Hubert* v. *Treherne*, (1842) 3 Man. & G. 743; 11 L. J. C. P. 78 S. C.; 60 R. R. 600.

(*q*) *Lobb* v. *Stanley*, *supra*; *Ogilvie* v. *Foljambe*, *supra*.

mere initials of the party (*r*), but if it be subscribed, without signature, "by your affectionate mother" (*s*), or the like, it will not suffice. A printed signature has been held sufficient where the party to be charged had written other parts of the memorandum, or had done other acts amounting to a recognition of his printed name (*t*). A telegram, sent in the usual way by the party to be charged, and containing his name, would satisfy the Act, on the sensible ground that justice must adapt itself to the altered habits of the day (*u*). Again, it is unnecessary that the agreement or memorandum should be signed by both parties; for the Statute of Frauds only requires that it should be signed "by the party to be charged therewith," that is, by the defendant, against whom the performance or damages are demanded (*v*). If it be said that, unless the plaintiff also signs, there is a want of mutuality, the answer is, that the defendant had it in his power to require the plaintiff's signature; and that, if he has not done so, it is his own fault (*x*). Even a written and signed proposal accepted by parol will be sufficient (*y*), provided the offer be accepted in its entirety (*z*); and so will a parol acceptance of one or two alternatives contained in a written and signed offer (*a*).

§ 1030. Having made these general observations, which will be found to apply, not only to the Statute of Frauds, but to most, if not all, of the Acts that render documentary proof necessary, it will be convenient to notice briefly such of the transactions enumerated

(*r*) *Phillimore* v. *Barry*, (1808) 1 Camp, 513; 10 R. R. 742.

(*s*) *Selby* v. *Selby*, (1817) 3 Mer. 2; 17 R. R. 1.

(*t*) *Schneider* v. *Norris*, (1814) 2 M. & S. 286; 15 R. R. 250; *Saunderson* v. *Jackson*, *supra*; *Tourret* v. *Cripps*, (1879) 48 L. J. Ch. 567.

(*u*) *Godwin* v. *Francis*, (1870) L. R. 5 C. P. 121; 39 L. J. C. P. 121.

(*v*) *Laythoarp* v. *Bryant*, (1836) 2 Bing. N. C. 735; 5 L. J. C. P. 217; 42 R. R. 709; *Liverpool Borough Bank* v. *Eccles*, (1859) 4 H. & N. 139; 28 L. J. Ex. 122; 118 R. R. 356; *Seton* v. *Slade*, (1802) 7 Ves. 275; 6 R. R. 124; *Egerton* v. *Mathews*, (1805) 6 East, 307; 8 R. R. 489; *Allen* v. *Bennet*, (1810) 3 Taunt. 169; 12 R. R. 633. The last two cases were decisions on s. 17 of the Statute of Frauds, which uses the word *parties*. These cases overrule the dicta of Ld. Redesdale and Sir T. Plumer in *Lawrenson* v. *Butler*, (1802) 1 Sch. & Lef. 13; and *O'Rourke* v. *Perceval*, (1811) 2 Ball & B. 58; 12 R. R. 68. See 3 Man. & G. 462, n., and 2 Kent Com. 510. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, see *Wetherell* v. *Langston*, (1847) 1 Ex. 634; 17 L. J. Ex. 338; 74 R. R. 794; *Pitman* v. *Woodbury*, (1848) 3 Ex. 4; 77 R. R. 537; *Brit. Emp. Ass. Co.* v. *Browne*, (1852) 12 C. B. 723; 22 L. J. C. P. 49; 92 R. R. 866; *Morgan* v. *Pike*, (1854) 14 C. B. 473; 23 L. J. C. P. 64; 98 R. R. 708; *Swatman* v. *Ambler*, (1852) 8 Ex. 72; 22 L. J. Ex. 81; 91 R. R. 379.

(*x*) *Laythoarp* v. *Bryant*, (1836) 2 Bing. N. C. 743, per Tindal, C.J.

(*y*) Per Cresswell, J., in *Ashcroft* v. *Morrin*, (1842) 4 M. & G. 451; 11 L. J. C. P. 265; 61 R. R. 559; *Watts* v. *Ainsworth*, (1862) 1 H. & C. 83; 31 L. J. Ex. 448; 130 R. R. 388; *Smith* v. *Neale*, (1857) 2 C. B. (N.S.) 67, 88; 26 L. J. C. P. 143; 109 R. R. 611; *Peek* v. *North Staffordshire Ry.*, (1860) 29 L. J. Q. B. 97; *Warner* v. *Willington*, (1856) 3 Drew. 532; 25 L. J. Ch. 662; 106 R. R. 416; *Reuss* v. *Picksley*, (1866) L. R. 1 Ex. 342; 35 L. J. Ex. 218; 143 R. R. 797.

(*z*) See *Forster* v. *Rowland*, (1861) 30 L. J. Ex. 396; 7 H. & N. 103; 126 R. R. 353.

(*a*) *Lever* v. *Koffler*, [1901] 1 Ch. 543; 70 L. J. Ch. 395.

in the Statute of Frauds, as seem to require explanation. And first as to *guarantees* (*b*). The law with respect to these instruments has been materially altered by the Mercantile Law Amendment Act of 1856 (*c*). Prior to the 29th of July in that year (*d*), a guarantee,—like other agreements, which the Statute of Frauds requires to be in writing (*e*),—was deemed invalid, unless the consideration for the promise was set forth in the document, or at least could be implied from the language used. But that rule,—as was pointed out in the second edition of this work (*f*),—caused such gross injustice to be perpetrated, especially in the County Courts, that the attention of Parliament was at length directed to the matter. A clause was consequently inserted in the Act just cited (*g*), which enacts, that "no special promise to be made by any person after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." This provision is silent as to what consequences would result from the needless insertion in the memorandum of a *past* consideration, or of any other consideration which is insufficient in law. It remains, therefore, to be seen whether, in this event, the courts would admit parol evidence to vary the terms of the written document, and to show that the real consideration for the promise was other than that stated (*h*). Moreover, it must be borne in mind, that, although parol evidence is rendered admissible by the statute for the purpose of supplying the consideration, it cannot be received now, any more than formerly, to explain the promise (*i*).

§ 1031. In administering the law relating to guarantees, one of the main difficulties is to distinguish between original and collateral promises; that is, between cases where, though goods are supplied to a third party, credit is given solely to the defendant, and cases where the person for whose use the goods are furnished is primarily liable, and the defendant only undertakes to pay for them in the event

(*b*) Guarantees must now be in writing under the Scotch law. See 19 & 20 V. c. 60, s. 6.

(*c*) 19 & 20 V. c. 97.

(*d*) When the Act passed.

(*e*) *Ante*, § 1021.

(*f*) § 933.

(*g*) S. 3 of the Act.

(*h*) See *post*, § 1197, *ad fin.*

(*i*) *Holmes* v. *Mitchell*, (1859) 7 C. B. (N.S.) 361; 28 L. J. C. P. 301; 121 R. R. 536.

of the other party making default (*k*). As this is a question of fact for the jury it is seldom possible to lay down any precise rule of construction, though the courts in this country, as well as those in America, have held that agreements by factors to sell upon *del credere* commission, do not fall within the fourth section of the Statute of Frauds, and, consequently, need not be in writing (*l*). In general, however, cases of this kind must separately be determined on their own merits (*m*); it being remembered that original promises will be valid, though verbally made (*n*), while collateral promises must be in writing, in order to satisfy the statute (*o*).

§ 1032. As the promise must, in the words of the Act, be one "to answer for the debt, default, or miscarriage of another" (*p*), the liability of that other must continue notwithstanding the promise, or the defendant will not be allowed to rely on the absence of a written document (*q*). For instance, if a defendant, in consideration that the plaintiff will discharge out of custody his debtor taken on a ca. sa., promises to pay the debt, this promise need not be in writing, it being regarded as an original one; because the moment the debtor is discharged, his liability is at an end, and the promise of the defendant cannot take effect till after the discharge (*r*). So, where a creditor had issued execution against a debtor, but subsequently it was arranged with the assent of all parties that the debtor should convey his property to a third party, who thereupon undertook, in consideration of the creditor relinquishing his execution, to pay the amount of the debt, it was held that this undertaking was not within the statute, as the effect of the arrangement was to discharge the original debtor (*s*). So, where A. promised B. to pay him a certain sum in case he withdrew his record in an action against C. for assault and battery, this was held to be an original promise (*t*).

(*k*) *Birkmyr* v. *Darnell*, (1704) Salk. 27; *Forth* v. *Stanton*, (1668) 1 Wms. Saund. 211 a—211 e; *Barrett* v. *Hyndman*, (1840) 3 Ir. L. R. 109; *Fitzgerald* v. *Dressler*, (1859) 29 L. J. C. P. 113; 7 C. B. (N.S.) 374; 121 R. R. 543; *Mallett* v. *Bateman*, (1865) L. R. 1 C. P. 163; 35 L. J. C. P. 40. See *Orrell* v. *Coppock*, (1857) 26 L. J. Ch. 269.

(*l*) *Couturier* v. *Hastie*, (1852) 8 Ex. 40; 22 L. J. Ch. 97; 91 R. R. 379; *Wickham* v. *Wickham*, (1855) 2 K. & J. 478; 110 R. R. 328; *Wolff* v. *Koppell*, (1843) 5 Hill, N. Y. R. 458 (Am.).

(*m*) 1 Wms. Saund. 211 h; 1 Smith, L. C., 340.

(*n*) Unless for the sale of goods for the price of £10 or upwards. See *ante*, § 1020.

(*o*) See *Mountstephen* v. *Lakeman*, (1874) L. R. 7 H. L. 17; 43 L. J. Q. B. 188.

(*p*) As to the meaning of these words, see *Macrory* v. *Scott*, (1850) 5 Ex. 907; 20 L. J. Ex. 90.

(*q*) See *Gull* v. *Lindsay*, (1849) 4 Ex. 45; 18 L. J. Ex. 354.

(*r*) *Goodman* v. *Chase*, (1818) 1 B. & Ald. 297; 19 R. R. 322; *Butcher* v. *Steuart*, (1843) 11 M. & W. 857, 873; 12 L. J. Ex. 391; 63 R. R. 796; *Lane* v. *Burghart*, (1841) 1 Q. B. 933, 937, 938; 11 L. J. C. P. 53. See *Reader* v. *Kingham*, (1862) 13 C. B. (N.S.) 344; 52 L. J. C. P. 108; 134 R. R. 561.

(*s*) *Bird* v. *Gammon*, (1837) 3 Bing. N. C. 883; 6 L. J. C. P. 258; 43 R. R. 839.

(*t*) *Read* v. *Nash*, (1751) 1 Wils. 305; recognised in 3 Bing. N. C. 889; but questioned and said to be in effect overruled by *Kirkham* v. *Marter*, (1819) 2 B. & Ald. 613; 21 R. R. 416. See 1 Wms. Saund. (1871 ed.), p. 231.

§ 1033. On the other hand, where an execution debtor was discharged out of custody upon giving a warrant of attorney to secure the payment of his debt by instalments, and the defendant, knowing of this warrant of attorney, undertook, in consideration of the discharge, to see the debt paid, the court held, that as the debtor's liability was kept alive by the warrant, the defendant's undertaking should be regarded in the light of a collateral guarantee, and as such, was a promise within the meaning of the statute (*u*). So, where it was agreed between a plaintiff, his attorney, and the defendant, that in consideration of the discontinuance of the suit, the defendant should pay the attorney the costs due from the plaintiff, this was considered a promise to pay the debt of another, as, in the event of its breach, the attorney might still recover his costs from the plaintiff who retained him (*v*). A promise to answer for the debt of another person, who himself never becomes legally indebted to the promisee, is probably not within the Act, although at the time of the making of the promise, both parties intended that a contract of suretyship should be created (*x*). Moreover, it makes no difference whether the goods were delivered to the third party (*y*), or the debt incurred, or the default committed by him, before or after the promise by the defendant; but the statute applies only to promises made to the person to whom another is already, or is to become answerable (*z*). A promise to *indemnify* is not within the statute, but is an original contract between the parties, and therefore need not be in writing (*a*); a promise therefore to indemnify another, "if you accept these bills for which my son's firm will become liable," will be good, although made by parol (*b*). A promise, however, to indorse bills for the amount of a debt due from a company, if a creditor will withdraw a writ of execution against the company, and so give time for payment, is not a contract of indemnity, but a promise to answer for the debt of another, and therefore within the statute (*c*).

§ 1034. Again, the statute applies to promises to answer for the *tortious* default or miscarriage of another, as well as for his breach

(*u*) *Lane* v. *Burghart*, *supra*.

(*v*) *Tomlinson* v. *Gell*, (1837) 6 A. & E. 564; 6 L. J. K. B. 139.

(*x*) *Lakeman* v. *Mountstephen*, (1874) L. R. 7 H. L. 17; 43 L. J. Q. B. 193, per Lord Selborne.

(*y*) *Matson* v. *Wharam*, (1787) 2 T. R. 80; 1 R. R. 429; *Anderson* v. *Hayman*, (1789) 1 H. Bl. 120; 2 R. R. 734.

(*z*) Notes to *Forth* v. *Stanton*, Williams' notes to Saunders (1871 ed.), vol. i, p. 234; *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778; 71 L. J. K. B. 529.

(*a*) *Thomas* v. *Cook*, (1828) 8 B. & C. 728; 7 L. J. (O.S.) K. B. 49; 32 R. R. 520; *Guild* v. *Conrad*, [1894] 2 Q. B. D. 885. And see *Harburg India Rubber Comb Co.* v. *Martin*, *supra*; *Wildes* v. *Dudlow*, (1875) L. R. 19 Eq. 198; 44 L. J. Ch. 341.

(*b*) *Guild* v. *Conrad*, *supra*.

(*c*) *Harburg India Rubber Comb Co.* v. *Martin*, *supra*.

of *contract*; and, therefore, where A. had killed the plaintiff's horse by hard riding without his leave, a verbal promise by the defendant to pay the damage, in consideration of the plaintiff forbearing to sue A., was held to be void (*d*). Where an entire promise is invalid as to a part for not being in writing, no action can be brought on the remainder which is not within the statute, but the whole promise, being indivisible, will be void (*e*). A promise to pay the promisee's own debt to a third person need not be in writing, for the Act merely applies to promises made to the person to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee (*f*): but the fact that the promisor is a shareholder in a company owing the debt, and is personally largely interested in freeing their goods from execution, does not make the company's debt his debt so as to take the case out of the statute if he personally guarantees payment without the requisite signed writing (*g*).

§ 1035. With respect to "*agreements made in consideration of marriage,*" the first observation which occurs is, that these words do not embrace mutual promises to marry; and therefore, notwithstanding the Act, such promises may be verbally made, as indeed is usually the case (*h*). Marriage is not a "part performance" of a contract within the general rule of equity that a contract void by statute will be enforced if it be a complete agreement (*i*), of which there has been such a part performance on the side of the plaintiff (*k*) that it would be a fraud on him if the defendant could object that the agreement was not in writing (*l*). Therefore, if a suitor verbally agrees to settle property on his intended wife, and the lady, relying on his honour, marries him, she cannot compel the performance of

(*d*) *Kirkham* v. *Marter*, *supra*.

(*e*) *Lexington* v. *Clark*, (1690) 2 Vent. 223; *Chater* v. *Beckett*, (1797) 7 T. R. 201; 4 R. R. 418; *Thomas* v. *Williams*, (1830) 10 B. & C. 664, 671; 8 L. J. (O.S.) K. B. 314; *Mechelen* v. *Wallace*, (1837) 7 A. & E. 49; 6 L. J. K. B. 217; 45 R. R. 669.

(*f*) *Eastwood* v. *Kenyon*, (1840) 11 A. & E. 438, 446; 9 L. J. Q. B. 409; 52 R. R. 400; *Hargreaves* v. *Parsons*, (1844) 13 M. & W. 561, 570; 14 L. J. Ex. 250; 67 R. R. 728; *Thomas* v. *Cook*, *supra*; *Reader* v. *Kingham*, *supra*; *Wildes* v. *Dudlow*, *supra*.

(*g*) *Harburg India Rubber Comb Co.* v. *Martin*, *supra*.

(*h*) B. N. P. 280, c.

(*i*) *Hammersley* v. *Baron de Biel*, (1845) 12 Cl. & F. 64; *Redding* v. *Wilks*, (1791) 3 Bro. C. C. 401; *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 571; 84 R. R. 158; *Warden* v. *Jones*, (1857) 2 De Gex & J. 76, 84; 27 L. J. Ch. 190; 119 R. R. 29; *Re Eyre*, (1895) 72 L. T. 588.

(*k*) *Lady Thynne* v. *Earl of Glengall*, (1847) 2 H. L. C. 131; 6 L. J. Ch. 25; 81 R. R. 77.

(*l*) *Clinan* v. *Cooke*, (1802) 1 Sch. & Lef. 41; 9 R. R. 3; *Kine* v. *Balfe*, (1813) 2 Ball & B. 347; *Surcome* v. *Pinniger*, (1853) 3 De Gex, M. & G. 571; 22 L. J. Ch. 419; 98 R. R. 229; *Taylor* v. *Beech*, (1749) 1 Ves. Sen. 297; *Ungley* v. *Ungley*, (1877) 5 Ch. D. 887; 46 L. J. Ch. 854.

his agreement (*m*); neither can a suitor, after simply marrying his intended wife, enforce the specific performance of a parol agreement made by her father with reference to settlements (*n*). However, in the event of a clear case of fraud being established, the court, notwithstanding the Act, would compel the father to realise the expectations, on the faith of which the marriage was contracted (*o*); and little doubt can be entertained that, if the father were to say to the suitor, "Marry my daughter, and settle so much a year on her for her jointure, in which case I will give you so much for her portion," this proposal, though not reduced to writing, would amount to a valid equitable contract, if the marriage were actually to take place, and the jointure were settled (*p*). A verbal agreement made before marriage will be enforced, if subsequently to the marriage it has been recognised and adopted in writing (*q*); thus, a post-nuptial settlement reciting an ante-nuptial verbal agreement, which has in fact been made, will constitute a sufficient memorandum in writing of the ante-nuptial agreement to satisfy the statute and enable the contract to be enforced against the settlor or his trustee in bankruptcy (*r*). But the Court will not interfere, even though there be a written memorandum, unless it appears that the marriage was contracted on the faith of the agreement (*s*); and, therefore, where a father wrote to his daughter, saying that he had agreed to give her intended husband £3,000 as her portion, and this letter was never shown to her husband, it was held not to be such an agreement in writing as satisfied the statute, since the husband could not have married on the faith of the letter (*t*).

(*m*) *Montacute* v. *Maxwell*, (1720) 1 P. Wms. 619; *Caton* v. *Caton*, (1867) L. R. 2 H. L. 127; 36 L. J. Ch. 866.

(*n*) *Dundas* v. *Dutens*, (1790) 1 Ves. 199; 1 R. R. 112; *Goldicutt* v. *Townsend*, (1860) 28 Beav. 445; 126 R. R. 209.

(*o*) *Baron de Biel* v. *Hammersley*, 3 Beav. 469, 475, 476, per Ld. Langdale.

(*p*) *Hammersley* v. *Baron de Biel*, *supra*; *Williams* v. *Williams*, (1868) 37 L. J. Ch. 854. See, also, *Maunsell* v. *White*, (1854) 4 H. L. C. 1039; 94 R. R. 532; *Bold* v. *Hutchinson*, (1855) 5 De Gex, M. & G. 558; 25 L. J. Ch. 598; 104 R. R. 196; *Jameson* v. *Stein*, (1855) 21 Beav. 5; 21 L. J. Ch. 41; 111 R. R. 1. See *Kay* v. *Crook*, (1857) 3 Sm. & G. 407; 107 R. R. 132. But there must at all events be actual fraud: *Johnstone* v. *Mappin*, (1891) 60 L. J. Ch. 241.

(*q*) *Barkworth* v. *Young*, (1857) 26 L. J. Ch. 153, 157; *Hammersley* v *Baron de Biel*, *supra*, citing *Hodgson* v. *Hutchenson*, (1712) 5 Vin. Abr. 522; *Taylor* v. *Beech*, (1749) 1 Ves. Sen. 297; and *Montacute* v. *Maxwell*, (1732) 1 Str. 236; and questioning *Randall* v. *Morgan*, (1805) 12 Ves. 73; 8 R. R. 289; where Sir W. Grant expressed serious doubt upon the subject. See 12 Cl. & F. 86, per Ld. Brougham; and 3 Beav. 475, 476, per Ld. Langdale. Also *Caton* v. *Caton*, (1867) L. R. 1 Ch. 137; 35 L. J. Ch. 292.

(*r*) *Re Holland*, [1902] 2 Ch. 360; 71 L. J. Ch. 518; disapproving the dicta of Lord Cranworth in *Warden* v. *Jones*, (1857) 2 De G. & J. 76; 27 L. J. Ch. 190; 119 R. R. 29; and Jessel, M.R., in *Trowell* v. *Shenton*, (1878) 8 Ch. D. 318; 47 L. J Ch. 739.

(*s*) See *Viret* v. *Viret*, (1880) 50 L. J. Ch. 69.

(*t*) *Ayliffe* v. *Tracy*, (1722) 2 P. Wms. 65. See *Dashwood* v. *Jermyn*, (1879) 12 Ch. D. 776.

§ 1036. In interpreting what is meant by an *agreement that is not to be performed within a year* from the making thereof, the courts have held that the statute does not apply, where the contract is capable of being performed on the one side or on the other within a year (*u*). Neither does it extend to an agreement made by a contractor to allow a stranger to share in the profits of a contract, which is incapable of being completed within a year, because such an agreement amounts to nothing more than the vendition of a right which is performed *instanter* on the bargain being struck (*v*). It would seem also that the statute is inapplicable in any case where the action is brought upon an executed consideration (*x*); for as the object of the Legislature clearly was, to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives,—it does not appear unreasonable to limit the statute to such actions only, as are brought to recover damages for the non-performance of contracts, which are not to be performed on either side within a year from the time of their being made (*y*). Subject, however, to the limitation just stated, a part-performance is not sufficient to take the case out of the statute: but whenever it appears, either by express stipulation, or by inference from the circumstances, that the contract is not to be completed on either side within the year, documentary proof of the agreement must be given (*z*). If, therefore, a farm-servant be verbally hired for a year's service, which is to commence at a future day, he cannot maintain an action against his master for discharging him before the expiration of the year, though he has faithfully performed his duty as such servant up to the date of his discharge (*a*). But though no action can be brought on the parol agreement, it will not be void for all purposes; for in the event of a sufficient service under it, the servant may acquire a poor law settlement (*b*).

(*u*) *Cherry* v. *Hemming*, (1849) 4 Ex. 631; 19 L. J. Ex. 631; 80 R. R. 733; and *Smith* v. *Neale*, (1857) C. B. (N.S.) 67; 26 L. J. C. P. 143; 109 R. R. 611; both recognising *Donellan* v. *Read*, (1832) 2 B. & Ad. 899; 1 L. J. K. B. 269; 37 R. R. 588.

(*v*) *M'Kay* v. *Rutherford*, (1848) 6 Moore P. C. 413, 429.

(*x*) *Knowlman* v. *Bluett*, (1874) L. R. 9 Ex. 307; 43 L. J. Ex. 151. See *ante*, §§ 974, 981—984; *post*, § 1043.

(*y*) *Souch* v. *Strawbridge*, (1846) 2 C. B. 814; 15 L. J. C. P. 170; 69 R. R. 615. See *Re Pentreguinea Coal Co.*, (1862) 4 De Gex, F. & J. 541; 135 R. R. 286.

(*z*) *Boydell* v. *Drummond*, (1809) 11 East, 142; 10 R. R. 450.

(*a*) *Bracegirdle* v. *Heald*, (1818) 1 B. & Ald. 722; 19 R. R. 442; *Snelling* v. *Huntingfield*, (1834) 1 C. M. & R. 20; 3 L. J. Ex. 232; 40 R. R. 484; *Britain* v. *Rossiter*, (1879) 48 L. J. Ex. 362; 11 Q. B. D. 123; *Giraud* v. *Richmond*, (1846) 2 C. B. 835; 15 L. J. C. P. 180; 69 R. R. 620. See *Cawthorne* v. *Cordrey*, (1863) 13 C. B. (N.S.) 406; 134 R. R. 576; 32 L. J. C. P. 152; *Banks* v. *Crossland*, (1874) L. R. 10 Q. B. 97; 44 L. J. M. C. 8. A contract to serve for one year, the service to commence on the day *next* after that on which the contract is made, has been held not to be a contract which is not to be performed within a year: *Smith* v. *Gold Coast and Ashanti Explorers, Ld.*, [1903] 1 K. B. 285, 538; 72 L. J. K. B. 235.

(*b*) 1 B. & Ald. 727, per Bayley, J.

§ 1037. Again, the fact that the contract may be determined by either party within the year, will not take the case out of the statute, if by its terms it purports to be an agreement, which is not to be completely performed till after the expiration of that period (*c*). Accordingly, a contract of employment for two years, but determinable by either party by six months' notice, to be given at any time during such period, is within the statute (*d*). Still, if the agreement is silent as to the time within which it is to be performed, and its duration rests upon a contingency, which may or may not happen within the year, as, for instance, if it depends on the death or marriage of a party, the length of a voyage, the giving of a notice, or the like, the case is not within the statute, though the event, which is to terminate the agreement, does not in fact occur within the year (*e*). Accordingly a contract to maintain a child for life need not be in writing, for the child may die within a year (*f*). When the contract is clearly one which is not to be performed within a year, it matters not whether it were made in this or in any other country; for, as the Act does not bar the right as well as the remedy, or in other words, does not render the agreement void, but only prevents its being enforced by action here, it applies to all foreign contracts equally with those entered into in England (*g*).

§ 1038. The term, *interest in lands*, used in section 4, is one that has given rise to much litigation, and its meaning is not yet satisfactorily defined. Little doubt, however, can be entertained that it extends to a contract to abate a tenant's rent (*h*); or to submit to arbitration the question whether a lease shall be granted (*i*); or to relinquish a tenancy, and let another party into possession for the residue of a term (*k*); or to permit the profits of a clergyman's living

(*c*) *Birch* v. *Ld. Liverpool*, (1829) 9 B. & C. 392, 395; 33 R. R. 212; *Roberts* v. *Tucker*, (1849) 3 Ex. 632; 77 R. R. 767; *Dobson* v. *Collis*, (1856) 1 H. & N. 81; 25 L. J. Ex. 267; 108 R. R. 466; *Re Pentreguinea Coal Co.*, *supra*; *Hanan* v *Ehrlich*, [1911] 2 K. B. 1056; [1912] A. C. 39; 81 L. J. K. B. 397

(*d*) *Hanan* v. *Ehrlich*, *supra*.

(*e*) *Souch* v. *Strawbridge*, *supra*; *Knowlman* v. *Bluett*, (1874) L. R. 9 Ex. 1; 43 L. J. Ex. 29; *Ridley* v. *Ridley*, (1865) 34 L. J. Ch. 462; 34 Beav. 478; 145 R. R. 621; *Wells* v. *Horton*, (1826) 4 Bing. 40; 5 L. J. (O.S.) C. P. 41; 29 R. R. 498; *Gilbert* v. *Sykes*, (1812) 16 East, 154; 14 R. R. 327; *Peter* v. *Compton*, (1693) Skin, 353; *Fenton* v. *Emblers*, (1762) 3 Burr. 1278. See *Mawor* v. *Payne*, (1825) 3 Bing. 285; 4 L. J. (O.S.) C. P. 36; 28 R. R. 625; *Murphy* v. *Sullivan*, (1866) 11 Ir. Jur. (N.S.) 111; *Farrington* v. *Donohue*, (1866) I. R. 1 C. L. 675; *Davey* v. *Shannon*, (1879) 4 Ex. D. 81; 48 L. J. Ex. 459.

(*f*) *Murphy* v. *Sullivan*, (1866) 11 Jur. (N.S.) 111; *McGregor* v. *McGregor*, (1888) 21 Q. B. D. 424; 57 L. J. Q. B. 591.

(*g*) *Leroux* v. *Brown*, (1852) 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889. But see *Williams* v. *Wheeler*, (1860) 8 C. B. (N.S.) 316; 125 R. R. 673.

(*h*) *O'Connor* v. *Spaight*, (1804) 1 Sch. & Lef. 306.

(*i*) *Walters* v. *Morgan*, (1792) 2 Cox, 369.

(*k*) *Buttemere* v. *Hayes*, (1839) 5 M. & W. 456; 9 L. J. Ex. 44; 52 R. R. 795; *Smith* v. *Tombs*, (1839) 3 Jur. 72; *Cocking* v. *Ward*, (1845) 1 C. B. 858; 15 L. J.

to be received by a trustee (*l*); or to repay a loan out of the future rent of a farm (*m*); or to become a partner in a colliery, which was to be demised by the partnership upon royalties (*n*); or to withdraw from a partnership and to assign one's share in the partnership assets which include real or leasehold property (*o*); or to take furnished lodgings (*p*); or to exercise sporting rights over land, and carry off a portion of the game killed (*q*); or to convey an equity of redemption (*r*). It is not necessary in order to bring the case within the statute that the party contracting to sell an estate or interest in land should himself be entitled to an estate or interest in such land; accordingly a contract by a public house broker "to get the lease and everything for £60" was held within the statute (*s*). On the other hand, it appears that an equitable mortgage by the deposit of title-deeds (*t*); a collateral agreement by a lessee to pay a percentage on money laid out by the landlord on the premises (*u*); a contract relating to the investigation of a title to land (*v*); an agreement for board and lodging, no particular rooms being demised (*x*); an agreement between a landlord and tenant, that the former shall take at a valuation certain fixtures left by the latter in the house (*y*); an undertaking by a landlord to build a water-closet for his tenant (*z*); or to put the house in repair and put more furniture into it (*a*); an agreement for the use of a graving dock during the repairs of a ship (*b*); or a contract that an arbitrator shall determine the amount of damages sustained by a party, in consequence of a road having been made through his

C. P. 245; 68 R. R. 831; *Kelly* v. *Webster*, (1852) 12 C. B. 283; 21 L. J. C. P. 163; 92 R. R. 730; *Smart* v. *Harding*, (1855) 15 C. B. 652; 24 L. J. C. P. 76; 100 R. R. 530; *Hodgson* v. *Johnson*, (1859) 28 L. J. Q. B. 88; E. B. & E. 685; 113 R. R. 830; *Ronayne* v. *Sherrard*, (1877) I. R. 11 C. L. 146.

(*l*) *Alchin* v. *Hopkins*, (1834) 1 Bing. N. C. 102; 3 L. J. (O.S.) C. P. 272; 41 R. R. 574.

(*m*) *Ex parte Hall, Re Whitting*, (1878) 10 Ch. D. 615; 48 L. J. Bk. 79

(*n*) *Caddick* v. *Skidmore*, (1857) 2 De Gex & J. 52; 27 L. J. Ch. 153; 119 R. R. 21.

(*o*) *Gray* v. *Smith*, (1890) 43 Ch. D. 208; 53 L. J. Ch. 145.

(*p*) *Edge* v. *Strafford*, (1831) 1 Cr. & J. 391; 9 L. J. Ex. 101; *Inman* v. *Stamp*, (1815) 1 Stark. 12; 18 R. R. 740; *Mechelen* v. *Wallace*, (1837) 7 A. & E. 49; 6 L. J. K. B. 217; 45 R. R. 669; *Vaughan* v. *Hancock*, (1846) 3 C. B. 766; 16 L J. C. P. 1; 71 R. R. 483.

(*q*) *Webber* v. *Lee*, (1882) 51 L. J. Q. B. 174, 485; 9 Q. B. D. 315.

(*r*) *Massey* v. *Johnson*, (1847) 1 Ex. 255; 17 L. J. Ex. 182; 74 R. R. 645. See *Toppin* v. *Lomas*, (1855) 16 C. B. 145; 24 L. J. C. P. 144; 100 R. R. 664.

(*s*) *Horsey* v. *Graham*, 39 L. J. C. P. 58; (1869) L. R. 5 C. P. 9.

(*t*) *Russel* v. *Russel*, (1783) 1 Br. C. C. 269.

(*u*) *Hoby* v. *Roebuck*, (1816) 7 Taunt. 157; 17 R. R. 477.

(*v*) *Jeakes* v. *White*, (1851) 6 Ex. 873; 21 L. J. Ex. 265; 86 R. R. 527.

(*x*) *Wright* v. *Stavert*, (1850) 29 L. J. Q. B. 161; 2 E. & E. 721; 119 R. R. 930.

(*y*) *Hallen* v. *Runder*, (1834) 1 Cr. M. & R. 266; 3 L. J. Ex. 260; 40 R. R. 551; *Lec* v. *Gaskell*, (1876) 45 L. J. Q. B. 540; 1 Q. B. D. 700.

(*z*) *Mann* v. *Nunn*, (1874) 43 L. J. C. P. 241.

(*a*) *Angell* v. *Duke*, (1875) 44 L. J. Q. B. 78; L. R. 10 Q. B. 174.

(*b*) *Wells* v. *Kingston-upon-Hull*, (1875) L. R. 10 C. P. 402; 44 L. J. C. P. 257.

lands (*c*); are not within the statute. And where a wife promised her husband verbally that if he would purchase the lease of a house she would reimburse him and he did so, she was held bound by her promise, because her husband was not bound to purchase the lease, and for that reason the statute did not apply (*d*). How far the Act applies to profits *à prendre*, easements, and other incorporeal rights relating to lands, is a question by no means clear; though, on principle, it ought to extend to all agreements respecting rights of common, rights of way, grants of rent-charge, tolls, or licences coupled with an interest, however trifling, in lands (*e*). It was not suggested in *Hurst* v. *Picture Theatres, Lim.* (*f*), that the statute applied to the sale of a right to be admitted to and remain in a theatre for the purpose of witnessing the performance (*g*).

§ 1039. The question, whether shares in a joint-stock company (*h*), possessed of *real estate*, could be regarded as an interest in lands, was one which, formerly, was much discussed. The Legislature has, however, set the matter at rest, by enacting that all shares issued either under the old Joint-Stock Companies Act of 1856, or under the present Companies Act, "shall be personal estate . and shall not be of the nature of real estate" (*i*). In many cases, too, where the company has been incorporated by statute, Parliament has expressly declared that the shares shall be deemed personal estate (*k*). So, even in the absence of such a declaration, if the company be incorporated by statute or by charter from the Crown, and the real property be vested in the corporation, who are to have the sole management of it, the shares of the individual proprietors will be personalty, and will

(*c*) *Gillanders* v. *Ld. Rossmore*, (1835) Jones, Ex. 504; *Griffiths* v. *Jenkins*, (1864) 3 New R. 489.

(*d*) *Boston* v. *Boston*, [1904] 1 K. B. 124; 73 L. J. K. B. 17.

(*e*) *Cook* v. *Stearns*, (1814) 11 Mass. 533; *R.* v. *Salisbury*, (1838) 8 A. & E. 716; 7 L. J. M. C. 110.

(*f*) [1915] 1 K. B. 1; 83 L. J. K. B. 1837.

(*g*) In this case the ticket was not for any particular seat. It is thought, however, that if the ticket had been for a numbered seat the decision would probably have been to the same effect. Indeed, if the contract, being for a numbered seat, could possibly be regarded as a demise, the right of the ticket-holder to remain in undisturbed possession would be secured to him by s. 2 immediately he took possession, parol leases for not exceeding three years being excepted from the statute, and the question which arose in the case could not have arisen.

(*h*) As to shares in an ordinary private partnership, where the partnership are owners of real estate, see *Ashworth* v. *Munn*, (1878) 15 Ch. D. 363; 50 L. J. Ch. 107.

(*i*) 19 & 20 V. c. 47, s. 15; 25 & 26 V. c. 89, s. 22; 8 Edw. 7, c. 69, s. 22. The first two Acts are now repealed.

(*k*) This is so in the case of all companies subject to the provisions of the Companies Clauses Consolidation Act, 1845, 8 & 9 V. c. 16, s. 7. So, also, in the case of the Lancaster Canal Co., Mon. & B. 94; of the London & Birmingham Ry., see *Bradley* v. *Holdsworth*, (1838) 3 M. & W. 422; 7 L. J. Ex. 153; 49 R. R. 670, and of many others. Again, stock, to which the Colonial Stock Act, 1877, applies, is personal estate, 40 & 41 V. c. 59, s. 22.

consist of nothing more than a right to participate in the net produce of the property of the company. The same doctrine will apply, though the company be unincorporated—as, for instance, if it be a mining co-partnership conducted on the cost-book principle—provided that trustees be seized of the real estate in trust to use it for the benefit of the shareholders, and to make profits out of it, as part of the stock in trade; and provided that the interest of the shareholders be confined to those profits (*l*). If, however, the trustees hold the real estate in trust for themselves and the co-adventurers, present and future, in proportion to their number of shares, then there will be a direct trust in the realty; and, consequently, neither a bargain for, nor a transfer of, a share in such trust can be made without a note in writing (*m*). The question—under which of these two species of trusts the lands of any particular company may be held—is one of fact, to be determined in each case (in so far as the question may not be one of the construction of any document) by the jury (*n*). If the freehold, which forms the basis and subject-matter of the trade of an unincorporated company, be vested in the collective body, the shares of the individual co-partners seem clearly to fall within the meaning of the fourth section (*o*).

§ 1040. It is now settled that neither railway debenture stock created under the provisions of the Companies Clauses Act, 1863 (*p*), nor railway debentures, are an interest in lands (*q*).

(*l*) *Watson* v. *Spratley*, (1854) 10 Ex. 222; 24 L. J. Ex. 53; 102 R. R. 541. See *Myers* v. *Perigal*, (1851) 2 De Gex, M. & G. 599; 22 L. J. Ch. 431; 95 R. R. 245; *Walker* v. *Bartlett*, (1856) 18 C. B. 845; 25 L. J. C. P. 263; 107 R. R. 541; *Hayter* v. *Tucker*, (1857) 4 K. & J. 243; 116 R. R. 322; *Bennet* v. *Blain*, (1863) 33 L. J. C. P. 63; 15 C. B. 518; 137 R. R. 628; *Freeman* v. *Gainsford*, (1865) 34 L. J. C. P. 95; *Entwistle* v. *Davis*, (1867) 4 Eq. 272; 36 L. J. Ch. 825.

(*m*) *Id.*; *Gray* v. *Smith*, (1890) 43 Ch. D. 208; 53 L. J. Ch. 145; *Baxter* v. *Brown*, (1845) 7 Man. & G. 198; 14 L. J. C. P. 193; 66 R. R. 706; *Boyce* v. *Green*, (1826) Batty, 608. See *Morris* v. *Glynn*, (1859) 27 Beav. 218; 122 R. R. 378.

(*n*) *Watson* v. *Spratley*, *supra*.

(*o*) *Gray* v. *Smith*, *supra*. See further, as to the transfer of shares in joint stock companies, *ante*, § 986 to 989.

(*p*) 26 & 27 V. c. 118, s. 22.

(*q*) *Attree* v. *Hawe*, (1878) 9 Ch. D. 337; 47 L. J. Ch. 863; *Holdsworth* v. *Davenport*, (1876) 46 L. J. Ch. 20; 3 Ch. D. 185; *Walker* v. *Milne*, (1849) 11 Beav. 507; 18 L. J. Ch. 288; 83 R. R. 243. These cases overrule *Ashton* v. *Ld. Langdale*, (1851) 4 De Gex & Sm. 402; 20 L. J. Ch. 234; 87 R. R. 420; and *Chandler* v. *Howell*, (1877) 4 Ch. D. 651; 46 L. J. Ch. 25. In connection with this subject it may be convenient to mention that while, as stated above, debentures are not within s. 4 of the Statute of Frauds, scrip and shares in joint stock companies, whether incorporated or unincorporated, are not "goods, wares, and merchandises" within s. 17, now replaced by s. 4 (1) of the Sale of Goods Act; *Humble* v. *Mitchell*, (1839) 11 A. & E. 205; 9 L. J. Q. B. 29; 52 R. R. 318; *Hibblewhite* v. *M'Morine*, (1840) 6 M. & W. 214; 9 L. J. Ex. 217; 55 R. R. 578; *Knight* v. *Barber*, (1846) 16 M. & W. 66; 16 L. J. Ex. 18; *Tempest* v. *Kilner*, (1846) 3 C. B. 249; 71 R. R. 337; *Bowlby* v. *Ball*, (1846) 8 C. B. 284; 16 L. J. C. P. 18; *Duncuft* v. *Albrecht*, (1841) 12 Sim. 189; 56 R. R. 46; *Watson* v. *Spratley*, (1854) 10 Ex. 222; 24 L. J. Ex. 53; 102 R. R. 541. As the judgment determining this proceeds on the ground that such shares are mere choses in

§ 1041 (*r*). The principal difficulties in interpreting what is meant by an "interest in lands," have arisen in applying that term to cases, where trees, growing crops, or other things annexed to the freehold, have formed the subject of the contract; and here, the decisions of the courts, so far from furnishing a safe guide, only assist in confusing the student, since—to use the words of Lord Abinger—"no general rule is laid down in any of them, that is not contradicted by some other" (*s*). Indeed, the judges themselves have not yet agreed upon any uniform test, by which to try the merits of this question (*t*). In some cases they have endeavoured to solve it by reference to the law of emblements; and have held that whatever will go to the executor, the tenant being dead, cannot be considered as an interest in land (*u*). In other cases the test has been, whether the property in dispute could have been seized in execution at common law (*v*); in others, again, a distinction has been drawn between *fructus industriales* and the natural products of the soil (*x*); while, in not a few, the decisions have rested, partly on the legal character of the principal subject-matter of the contract, but principally on the consideration, whether, in order to effectuate the intention of the parties, it were necessary to give the vendee an interest in the land (*y*).

§ 1042. It is thought, however, that two broad principles may now be extracted. The first of these may be deduced from a decision of the Common Pleas Division in 1875 (*z*), and appears to be that a sale of *growing things* which are upon land is only within the statute as conferring an interest in land when it is part of the bargain that the things sold are to remain on the land till maturity, or for any other stipulated time, or when it is collateral to a transfer of the land itself; but that such a sale does not confer an interest in land, and is conse-

action (but in *In re Jackson, Ex parte the Union Bank of Manchester*, (1871) L. R. 12 Eq. 354; 40 L. J. Bk. 67, Bacon, V.C., held that shares in a company were not "things in action" within the meaning of 32 & 33 V. c. 71, s. 15 (5), now re-enacted by 4 & 5 G. 5, c. 59, s. 38 (c)), it also inferentially determines (*Heseltine* v. *Siggers*, (1848) 1 Ex. 856; 18 L. J. Ex. 166; 74 R. R. 862) that contracts for the sale of stock or Exchequer bills are not within the Act: *Pickering* v. *Appleby*, (1720) Com. Rep. 354, cited in *Colt* v. *Nettervill*, (1725) 2 P. Wms. 308.

(*r*) Gr. Ev. § 271, in part as to first four lines.

(*s*) *Rodwell* v. *Phillips*, (1842) 9 M. & W. 505; 11 L. J. Ex. 217; 60 R. R. 807.

(*t*) See 1 Sug. V. & P. 124-128, 141-158.

(*u*) *Rodwell* v. *Phillips*, *supra*; *Jones* v. *Flint*, (1839) 10 A. & E. 758; 9 L. J Q. B. 252; 50 R. R. 527.

(*v*) *Dunne* v. *Ferguson*, (1832) Hayes, 543; *Rodwell* v. *Phillips*, *supra*; *Jones* v. *Flint*, *supra*.

(*x*) *Jones* v. *Flint*, *supra*; *Evans* v. *Roberts*, (1826) 5 B. & C. 832; 4 L. J. (O.S.) K. B. 813; 29 R. R. 421; *Rodwell* v. *Phillips*, *supra*.

(*y*) *Jones* v. *Flint*, *supra*.

(*z*) *Marshall* v. *Green*, (1875) 1 C. P. D. 35; 45 L. J. C. P. 153. See, also, *Morgan* v. *Russell*, [1909] 1 K. B. 357; 78 L. J. K. B. 187; *Jones* v. *Tankerville*, [1909] 2 Ch. 440; 78 L. J. Ch. 674.

quently not within the statute when growing things are sold as chattels and are to be removed from the land forthwith after the sale. Endeavouring to view all the cases as to sales of growing crops by the light of this principle, it is submitted that a fair summary of the results of these decisions is as follows: :—First, a contract for the purchase of *fruits of the earth, ripe*, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them (*a*). Secondly, a sale of any growing produce of the earth, *reared annually by labour and expense*, and in actual existence at the time of the contract—as, for instance, a growing crop of corn (*b*), or hops (*c*), or potatoes (*d*), or turnips (*e*)—is not within the fourth section of the statute, though the purchaser is to harvest or dig them. Similarly, a contract for the sale of other growing things (for example, trees) *as chattels*, when the subject of the sale is ready to be cut and gathered at once, and the contract stipulates that they shall be removed immediately, and does not confer the possession or use of the land for any given time, either in order that it may contribute to the growth of the thing sold until its maturity, or for any other given purpose, is not a contract for an interest in land within the statute (*f*). This principle may also possibly afford a solution of the question which was once raised (*g*), as to whether the same rule would apply to contracts respecting the sale of teasles, liquorice, madder, clover, or other crops of a like nature, which do not ordinarily repay the labour by which they are produced within the year in which that labour is bestowed, and consequently, as it seems, do not fall within the law of emblements. Thirdly, an agreement respecting the sale of growing crops, not emblements, *when fit to be cut and taken*, such as growing fruit (*h*), grass (*i*), underwood (*k*), poles (*l*), or timber, is

(*a*) *Parker* v. *Staniland*, (1809) 11 East, 362; 10 R. R. 521; *Cutler* v. *Pope*, (1836) 1 Shepl. 337 (Am.).

(*b*) *Jones* v. *Flint*, *supra*.

(*c*) Per Parke, B., in *Rodwell* v. *Phillips*, *supra*, questioning *Waddington* v. *Bristow*, (1801) 2 Bos. & P. 452. See, also, *Graves* v. *Weld*, (1833) 5 B. & Ad. 119, 120; 2 L. J. K. B. 176; 39 R. R. 419. Hops occupy an exceptional position, for whilst they grow from "ancient roots," yet they are made fruitful annually by the "manurance and industry of the owner." Accordingly, so far as the annual product is concerned, hops rank with emblements: *Graves* v. *Weld*.

(*d*) *Sainsbury* v. *Matthews*, (1838) 4 M. & W. 343; 8 L. J. Ex. 1; 51 R. R. 620; *Evans* v. *Roberts*, *supra*; *Warwick* v. *Bruce*, (1813) 2 M. & S. 205; 14 R. R. 634.

(*e*) *Dunne* v. *Ferguson*, *supra*; *Emmerson* v. *Heelis*, (1809) 2 Taunt. 38; 11 R. R. 520, contrà, must be considered as overruled by *Evans* v. *Roberts*, *supra*; and by *Jones* v. *Flint*, *supra*.

(*f*) *Marshall* v. *Green*, *supra*; *Smith* v. *Surman*, (1829) 9 B. & C. 561; 7 L. J. (O.S.) K. B. 296; 33 R. R. 254; explained by Lord Abinger in *Rodwell* v. *Phillips*, *supra*.

(*g*) *Graves* v. *Weld*, *supra*.

(*h*) *Rodwell* v. *Phillips*, *supra*, resolving a doubt suggested by Littledale, J., in *Graves* v. *Weld*, *supra*.

(*i*) *Crosby* v. *Wadsworth*, (1805) 6 East, 602; 8 R. R. 566; *Carrington* v. *Roots*, (1837) 2 M. & W. 248; 6 L. J. Ex. 95; 46 R. R. 583.

within the fourth section, and a written contract of sale cannot be dispensed with (*m*). Fourthly, if the land itself is agreed to be sold or let, and the vendee or tenant contracts to purchase the growing crops, this last contract, though the crops taken under it may form the subject of a distinct valuation, will be so incorporated with the agreement relating to the land as to be inseparable from it, and will consequently fall within the fourth section of the Act (*n*). The second broad principle appears to be that the sale of an inanimate object which at the time of such sale forms part of an hereditament, even though the subject of the sale be treated by the contract as a chattel, is within section 4 of the Statute of Frauds—*e.g.*, a sale, as building materials, of a house to be taken down by the purchaser (*o*).

§ 1043. Where growing crops do not amount to an interest in lands, it is clear that an agreement respecting them may fall within the provisions which require a sale of goods to be in writing (*p*), and, therefore, at first sight, it may seem unimportant to raise any dispute upon the subject. But, in truth, two material distinctions exist between the Statute of Frauds and the Sale of Goods Act; for, first, contracts under the former must be stamped, while those under the latter are exempt (*q*); and next, no writing is required by the Sale of Goods Act, if the subject-matter of the contract is under the value of £10, or if there has been a part-payment, or a part-acceptance, by the purchaser (*r*). To constitute a part-payment, part of the purchase consideration must have actually passed at the time of the contract, it is not sufficient for the parties verbally to agree that a sum of money owing from the purchaser should be retained by the vendor on account of the price of the goods contracted to be sold (*s*). It is true, that parol agreements touching lands will be enforced, if they have been unequivocally performed in some *material* part; as, for instance, if possession has been distinctly taken under them and rent paid, or the

(*k*) *Scorell* v. *Boxall*, (1827) 1 Y. & J. 396; 30 R. R. 807.

(*l*) *Teal* v. *Auty*, (1820) 2 B. & B. 99; 22 R. R. 656.

(*m*) In two cases an agreement to sell growing timber was held not to convey any interest in the land, but in one of these the timber was to be felled and taken away "as soon as possible" by the purchaser, *Marshall* v. *Green*, (1875) 1 C. P. D. 135; 45 L. J. C. P. 153; and in the other the vendor had contracted to sell the timber at so much per foot, and that contract the court regarded in the same light as if it had related to the sale of timber already felled; *Smith* v. *Surman*, *supra*, explained by Lord Abinger in *Rodwell* v. *Phillips*, *supra*.

(*n*) *Ld. Falmouth* v. *Thomas*, (1832) 1 C. M. & R. 89; 2 L. J. Ex. 57; 38 R. R. 584; *Mayfield* v. *Wadsley*, (1824) 3 B. & C. 366; 3 L. J. (O.S.) K. B. 31, per Littledale, J.

(*o*) *Laverry* v. *Pursell*, (1888) 39 Ch. D. 508; 57 L. J. Ch. 570.

(*p*) The Sale of Goods Act, 1893.

(*q*) 54 & 55 V. c. 39, Sch. Tit. Agreement.

(*r*) *Ante*, § 1020.

(*s*) *Norton* v. *Davison*, [1899] 1 Q. B. 401; 68 L. J. Q. B. 265; *Walker* v. *Nussey*, (1847) 16 M. & W. 302; 16 L. J. Ex. 120; 73 R. R. 507

like (*t*); but, still, such agreements will not be excluded from the operation of the statute by any part-performance, which does not place the acting party in such a position, that it would be a fraud upon him if the contract were not completed (*u*).

§ 1044. As the fourth section of the Sale of Goods Act is confined to contracts for the sale of goods, it does not apply to a contract, which is substantially one for work and labour (*v*), or to an agreement to procure goods for another, and to convey them to a certain place (*x*). Neither does this section, any more than the fourth section of the Statute of Frauds, extend to fixtures, which, though chattels, are not goods, wares, or merchandise (*y*). But where the principal subject-matter of a contract is the sale of goods of the price or value of £10 or upwards, the contract falls within the section, though it includes other matters—as, for instance, the agistment of cattle—to which the statute does not apply (*z*). With respect to the price, which must be £10 or upwards in order to render a writing necessary, it may be observed, that if a person purchases several articles at one time, though at distinct prices, the transaction will be regarded as one entire contract; and, consequently, if the whole purchase-money amounts to £10, the case will be within the statute, though none of the articles taken separately may be of that value (*a*).

§ 1045. The *acceptance* and *actual receipt* mentioned by the statute (*b*) have given rise to much litigation; but, without entering into any lengthened discussion of the numerous decisions which bear on this point, it may suffice to observe, that each of the two terms

(*t*) *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737. This case deserves attentive perusal. See *Lanyon* v. *Martin*, (1884) 13 L. R. Ir. 297; *Miller* v *Aldworth, Ld.*, [1899] 1 Ch. 622; 68 L. J. Ch. 322; *Hodson* v. *Henland*, [1896] 2 Ch. 428; 65 L. J. Ch. 754; *Humphreys* v. *Green*, (1882) 10 Q. B. D. 148; 52 L. J. Q. B. 140; *Dale* v. *Hamilton*, (1846) 2 Phill. 266; 16 L. J. Ch. 397; 71 R. R. 127; *Lincoln* v. *Wright*, (1859) 28 L. J. Ch. 705; 4 De Gex & J. 16; 124 R. R. 133; *Nunn* v. *Fabian*, (1865) L. R. 1 Ch. 35; 35 L. J. Ch. 140; *Howe* v. *Hall*, (1870) I. R. 4 Eq. 242; *Williams* v. *Evans*, (1875) 44 L. J. Ch. 319; L. R. 19 Eq. 547; *Britain* v. *Rossiter*, (1879) 11 Q. B. D. 123. In *M'Manus* v. *Cooke*, (1887) 35 Ch. D. 681, it was stated that this doctrine probably applied to all cases in which the court would entertain a suit for specific performance if the contract had been in writing.

(*u*) *Maddison* v. *Alderson*, *Supra*; *Clinan* v. *Cooke*, (1802) 1 Sch. & Lef. 41; 9 R. R. 3. See *Haigh* v. *Kaye*, (1872) L. R. 7 Ch. 469; 41 L. J. Ch. 567; *Pulbrook* v. *Lawes*, (1876) 45 L. J. Q. B. 178; 1 Q. B. D. 284.

(*v*) *Clay* v. *Yates*, (1856) 25 L. J. Ex. 237; 1 H. & N. 73; 108 R. R. 461. But a contract to make a set of teeth to fit the mouth of the employer is not a contract for work and labour, so as to dispense with the statutes; *Lee* v. *Griffin*, (1861) 1 B. & S. 272; 30 L. J. Q. B. 252; 124 R. R. 555.

(*x*) *Cobbold* v. *Caston*, (1824) 1 Bing. 399; 2 L. J. (O.S.) C. P. 38.

(*y*) *Horsfall* v. *Hey*, (1848) 2 Ex. 778; 17 L. J. Ex. 266; 76 R. R. 782.

(*z*) *Harman* v. *Reeve*, (1856) 25 L. J. C. P. 257.

(*a*) *Baldey* v. *Parker*, (1823) 2 B. & C. 37; 1 L. J. (O.S.) K. B. 229; 26 R. R. 260. See, also, *Elliott* v. *Thomas*, (1838) 3 M. & W. 170; 7 L. J. Ex. 129; 49 R. R. 558; *Bigg* v. *Whisking*, (1853) 14 C. B. 195.

(*b*) See *ante*, § 1020.

has a distinct and separate meaning (*c*); that a compliance with both requisites is necessary to satisfy the statute (*d*); that an acceptance and receipt of part of the goods will be as operative as an acceptance and receipt of the whole (*e*); that in cases relating to the purchase of *specific* goods the acceptance may precede the receipt as well as follow it or be contemporaneous with it (*f*); that an agent authorised to receive goods is not consequently authorised to accept them (*g*); that the receipt, which itself implies delivery (*h*), must be such as will preclude the vendor from retaining any lien on the goods (*i*). But the acceptance need not be such as will preclude the purchaser from objecting to their quantity or quality, for, by section 4 (3) of the Sale of Goods Act, 1893, "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not." Accordingly where goods were delivered to the buyer, who took a sample from them, for the purpose of comparing same with a sample already in his possession, and, after examining it, said that the goods were not equal to his sample, and that he would not have them, it was held that a county court judge was justified in finding that there had been a sufficient acceptance by him to satisfy section 4 (*k*). The questions whether there was "acceptance" as defined by section 4 (3), and whether there was "actual receipt" of the goods by the buyer are questions of fact for the jury (*l*). In order to amount to actual receipt there must be delivery by the vendor and receipt by the buyer amounting to the transfer of possession in the intention of both parties (*m*). The mere marking of goods by the vendee in the vendor's

(*c*) *Cusack* v. *Robinson*, (1861) 1 B. & S. 299; 30 L. J. Q. B. 261; 124 R. R. 566.

(*d*) *Id.*

(*e*) *Morton* v. *Tibbett*, (1850) 15 Q. B. 434; 19 L. J. Q. B. 382; 81 R. R. 666; *Kershaw* v. *Ogden*, (1865) 34 L. J. Ex. 159; 3 H. & C. 717; 140 R. R. 694.

(*f*) *Cusack* v. *Robinson*, *supra*, resolving a doubt expressed in *Saunders* v. *Topp*, (1849) 4 Ex. 390; 18 L. J. Ex. 374; 80 R. R. 624; and adopting in part a dictum of Lord Campbell's in *Morton* v. *Tibbett*, *supra*.

(*g*) *Nicholson* v. *Bower*, (1858) 1 E. & E. 172; 28 L. J. Q. B. 97; 117 R. R. 167; *Hansom* v. *Armitage*, (1822) 5 B. & Ald. 557; 24 R. R. 478; *Norman* v. *Phillips*, (1845) 14 M. & W. 276; 14 L. J. Ex. 306.

(*h*) *Saunders* v. *Topp*, *supra*.

(*i*) *Baldy* v. *Parker*, *supra*; *Maberley* v. *Sheppard*, (1833) 10 Bing. 101; 2 L. J. C. P. 181; 38 R. R. 403; *Smith* v. *Surman*, (1829) 9 B. & C. 561, 577; 7 L. J. (O.S.) K. B. 296; 33 R. R. 354; *Tempest* v. *Fitzgerald*, (1820) 3 B. & Ald. 680, 684; 22 R. R. 526; *Carter* v. *Toussaint*, (1822) 5 B. & Ald. 859; 24 R. R. 589; *Holmes* v. *Hoskins*, (1854) 9 Ex. 753; 96 R. R. 959; *Cusack* v. *Robinson*, *supra*; *Grice* v. *Richardson*, (1877) 3 App. Cas. 319; 47 L. J. C. P. 48.

(*k*) *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97; 64 L. J. Q. B. 388; *Page* v. *Morgan*, [1885] 15 Q. B. D. 228; 54 L. J. Q. B. 434.

(*l*) *Abbott* v. *Wilsey*, *supra*; *Morton* v. *Tibbett*, *supra*; *Bushel* v. *Wheeler*, (1844) 15 Q. B. 442, n.; 81 R. R. 675.

(*m*) *Phillips* v. *Bistolli*, (1824) 2. B. & C. 514; 2 L. J. (O.S.) K. B. 116; 26 R. R. 433; recognised in *Maberley* v. *Sheppard*, *supra*. See *Curtis* v. *Pugh*, (1847) 10 Q. B. 111; 16 L. J. Q. B. 199; 74 R. R. 220; *Saunders* v. *Topp*, *supra*; and *Tomkinson* v. *Staight*, (1856) 17 C. B. 697; 25 L. J. C. P. 85; 104 R. R. 846.

shop, when they are to be paid for by ready money, will not suffice, as this act, though it may constitute a valid acceptance (*n*), is not such a receipt by the vendee as will deprive the vendor, even when he assents to it, of his right of lien (*o*).

§ 1046. But where a party, having agreed to purchase some wool, had it sent to another warehouse for deposit, and then weighed it and packed it in his own sheeting, this was held to be a sufficient acceptance and receipt, though by the course of dealing he was not to remove it to its ultimate place of destination before payment, and no payment had been made. The court considered that, under these circumstances, the vendor had not what could properly be called a lien on the wool, but merely a special interest in it, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the purchaser (*p*). So, where some horses were purchased of a dealer who kept a livery stable, and the buyer directed the seller to keep them at livery, upon which they were transferred from the sale to the livery stable, it was held that this direction was equivalent to an acceptance and receipt of the horses, as the buyer became liable for their keep, which would not have been the case, unless they had actually gone into his possession (*q*). So, where a timber merchant, having bought some growing trees by verbal contract, cut down six of them and sold the lops and tops, the vendor of the trees was held to be too late in attempting to countermand the sale (*r*). So, where a stack of hay had been purchased by parol, and afterwards the vendee sold part to a third person, who removed it, the jury were held to be justified in finding an acceptance and actual receipt (*s*).

(*n*) *Cusack* v. *Robinson*, *supra*.

(*o*) *Baldey* v. *Parker*, *supra*; *Bill* v. *Bament*, (1841) 9 M. & W. 36; 11 L. J. Ex. 81; 60 R. R. 658; *Proctor* v. *Jones*, (1826) 2 C. & P. 532; 31 R. R. 693; *Kealy* v. *Tenant*, (1861) 13 Ir. L. R. 394. These cases seem virtually to overrule *Hodgson* v. *Le Bret*, (1808) 1 Camp. 233; and *Anderson* v. *Scot*, (1806) *id.* 235, n. See *Saunders* v. *Topp*, *supra*; and *Acraman* v. *Morrice*, (1849) 8 C. B. 449; 19 L. J. C. P. 57; 70 R. R. 568.

(*p*) *Dodsley* v. *Varley*, (1840) 12 A. & E. 632; 54 R. R. 652; *Langton* v. *Higgins*, (1859) 4 H. & N. 402; 28 L. J. Ex. 252; 118 R. R. 515; *Aldridge* v. *Johnson*, (1857) 7 E. & B. 885; 26 L. J. Q. B. 296; 110 R. R. 875; *Kershaw* v. *Ogden*, (1865) 34 L. J. Ex. 159; 3 H. & C. 717; 140 R R. 694. See *Simonds* v. *Humble*, (1862) 13 C. B. (N.S.) 258; 134 R. R. 526. As to the effect of banding over a sample of the goods, see *Gardner* v. *Grout*, (1857) 2 C. B. (N.S.) 340; 109 R. R. 706.

(*q*) *Elmore* v. *Stone*, (1809) 1 Taunt. 458; 10 R. R. 578; explained and recognised by Bayley, J., in *Smith* v. *Surman*, *supra*. See *Castle* v. *Sworder*, (1861) 6 H. & N. 828; 30 L. J. Ex. 310; 123 R. R. 860; *Carter* v. *Toussaint*, *supra*; *Beaumont* v. *Brengeri*, (1847) 5 C. B. 301; 75 R. R. 731; *Holmes* v. *Hoskins*, *supra*; *Marvin* v. *Wallace*, (1856) 25 L. J. Q. B. 369; 6 E. & B. 726; 106 R. R. 784. See *Taylor* v. *Wakefield*, (1856) 6 E. & B. 765; 106 R. R. 793.

(*r*) *Marshall* v. *Green*, (1875) 1 C. P. D. 35; 45 L. J. C. P. 153.

(*s*) *Chaplin* v. *Rogers*, (1800) 1 East, 192; 6 R. R. 249; recognised by Bayley, J., in 9 B. & C. 570. See *Stoveld* v. *Hughes*, (1811) 14 East, 308; 12 R. R. 523; and *Searle* v. *Keeves*, (1797) 2 Esp. 598.

§ 1047. A person, intrusted with another's goods to sell, with the right to buy them himself, may himself become the purchaser by parol, and may do subsequent acts which will amount to an acceptance and receipt on his part; as, for instance, if he sells them to a stranger on his own account (*t*). The evidence, however, to sustain such a case must be extremely clear (*u*).

§ 1048. Where the goods are ponderous and incapable of being handed over from one to another, a constructive delivery—such, for example, as the giving up the key of the warehouse in which they are deposited, or the delivery of other indicia of property—will be sufficient (*v*). But, in all these cases, the acts of the parties, in order to be tantamount to a delivery and actual receipt, must be unequivocal (*x*); and, therefore, where goods are lodged with a warehouseman as agent for the vendor, the mere acceptance and retainer by the purchaser of the warrant or delivery order will not amount to an actual receipt of the goods, so as to bind the bargain (*y*); but to have this effect, the document must be lodged by the purchaser with the warehouseman, who must then, as it were, attorn to him, or, in other words, agree to hold the property henceforth as his agent (*z*).

§ 1049. One of the chief difficulties in construing this branch of the statute, is where goods, verbally purchased, are delivered to a carrier or wharfinger named by the vendee; and here it seems to have been once considered, that such delivery was sufficient to satisfy the statute (*a*). However, it has since been held, that though the delivery to the carrier may be a delivery to the purchaser, the acceptance of the carrier is not an acceptance by him (*b*); and, therefore, where timber, verbally ordered, was forwarded in this manner to the purchaser, but he refused to take it in, the Court of Exchequer held that the jury were not warranted in finding an acceptance, though an invoice had been sent to the purchaser and retained by him, and though he had omitted to give notice to the vendor of his refusal to

(*t*) *Edan* v. *Dudfield*, (1841) 1 Q. B. 302; 55 R. R. 258; *Lillywhite* v. *Devereux*, (1846) 15 M. & W. 289, 291; 71 R. R. 670.

(*u*) *Id.*

(*v*) *Chaplin* v. *Rogers*, *supra*.

(*x*) *Nicholle* v. *Plume*, (1824) 1 C. & P. 272, per Best, C.J.; *Edan* v. *Dudfield*, (1841) 1 Q. B. 307.

(*y*) *M'Ewan* v. *Smith*, (1849) 2 H. L. C. 309; 81 R. R. 166.

(*z*) *Farina* v. *Home*, (1846) 16 M. & W. 119, 123; 16 L. J. Ex. 73; 73 R. R. 433, per Parke, B.; *Bentall* v. *Burn*, (1824) 3 B. & C. 423; 3 L. J. (O.S.) K. B. 42; 27 R. R. 391.

(*a*) *Hart* v *Sattley*, (1814) 3 Camp. 528. See *Dawes* v. *Peck*, (1799) 8 T. R. 330; 4 R. R. 675; and *Dutton* v. *Solomonson*, (1803) 3 Bos. & P. 582; 7 R. R. 883.

(*b*) *Johnson* v. *Dodgson*, (1837) 2 M. & W. 656; 6 L. J. Ex. 185; 46 R. R. 733. See *Acebal* v. *Levy*, (1834) 10 Bing. 376; 3 L. J. C. P. 98; 38 R. R. 469; *Coats* v. *Chaplin*, (1842) 3 Q. B. 483; 11 L. J. Q. B. 315; 61 R. R. 267; *Nicholson* v. *Bower*, (1858) 28 L. J. Q. B. 97; 1 E. & E. 172; 117 R. R. 167.

take the goods till after the expiration of more than a month (*c*). It is true that, under somewhat similar circumstances, the Court of Queen's Bench has pronounced an opposite decision; but in that case the vendee did not reject the goods for seven months; and Mr. Justice Coleridge rested his judgment on the ground that the inspection of the goods was to be made within a reasonable time (*d*). Whether this distinction can be supported is another question; but thus much is at least clear—that if a purchaser, who has the right of approval, retains for an unreasonable time goods which have been delivered to him, he will lose his right to reject them, and his conduct will amount to an acceptance (*e*); and, further, the same rule will hold if the goods have been delivered to a general agent of the purchaser, who was authorised by him to examine their quality (*f*). It is also clear that, if the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property continuing in the vendor—as, for instance, if he changes their original destination, and resells them to a third party at a profit—the jury will be justified in finding that he has accepted the goods and actually received them, though they have been merely delivered to his carriers, and he himself has never seen them (*g*).

§ 1050. The *Wills Act* (*h*)—which came into operation on the 1st of January, 1838—has effected extensive amendments in the law respecting these instruments; and it will here be expedient to notice such of the alterations as relate to the execution of wills. By this Act, every will, codicil, or other testamentary disposition—including appointments made by will, or by writing in the nature of a will, in exercise of any power (*i*), whether such power were created before or after the Act came into operation (*k*), but excluding nuncupative wills, disposing of personal estate, made by soldiers in actual military

(*c*) *Norman* v. *Phillips*, (1845) 14 M. & W. 277; 14 L. J. Ex. 306; *Meredith* v. *Meigh*, (1853) 2 E. & B. 364; 22 L. J. Q. B. 401; 96 R. R. 603; *Hunt* v. *Hecht*, (1853) 8 Ex. 814; 22 L. J. Ex. 293; 91 R. R. 780; *Hart* v. *Bush*, (1858) 27 L. J. Q. B. 271; E. B. & E. 494; 113 R. R. 744; *Coombs* v. *Bristol & Exeter Ry.*, (1858) 27 L. J. Ex. 401; *Smith* v. *Hudson*, (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 141 R. R. 459.

(*d*) *Bushel* v. *Wheeler*, (1844) 15 Q. B. 442, n.; 81 R. R. 675; explained by Alderson, B., in 14 M. & W. 282. See, also, *Currie* v. *Anderson*, (1860) 29 L. J. Q. B. 87; 2 E. & E. 592; 119 R. R. 859.

(*e*) *Coleman* v. *Gibson*, (1832) 1 M. & Rob. 168; 42 R. R. 770; *Norman* v. *Phillips*, *supra*; *Bowes* v. *Pontifex*, (1863) 3 F. & F. 739.

(*f*) *Norman* v. *Phillips*, *supra*.

(*g*) *Morton* v. *Tibbett*, (1850) 15 Q. B. 428; 19 L. J. Q. B. 382; 81 R. R. 666; explained by Martin, B., in *Hunt* v. *Hecht*, *supra*.

(*h*) 7 W. 4 & 1 V., c. 26.

(*i*) §§ 1 & 10.

(*k*) *Hubbard* v. *Lees*, (1866) L. R. 1 Ex. 255; 35 L. J. Ex. 169.

service, or by seamen and mariners at sea (*l*)—must, if made, or re-executed, or re-published, or revived by any codicil, on or after the 1st of January, 1838 (*m*), be in writing, "and be signed at the foot or end thereof by the testator, or by some other person in his presence (*n*) and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary" (*o*). Appointments by will, if executed in this manner, are valid, although the power, under which they were made, expressly requires some additional solemnity in the execution (*p*); and all wills, executed as above stated, shall be deemed good without other publication (*q*).

§ 1051. An exception, indeed, is recognised as to the wills of petty officers and seamen in the Royal Navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty-money, allowances, and moneys payable in respect of services in His Majesty's Navy (*r*). By the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58) sailors are placed in the same position as soldiers, and a soldier or sailor, though under the age of twenty-one years, may dispose of real estate, in the same manner as personal estate, by nuncupative will (*s*).

§ 1052. In contrasting these provisions with those formerly contained in the Statute of Frauds (*t*), it will be observed, first, that they are not confined, as in the Act of Charles II., to devises disposing of freehold realty, but that they apply equally to all wills, whether

(*l*) § 11. See *post*, § 1062, and Will. on Ex., 10th ed., vol. 1, p. 90.

(*m*) § 34.

(*n*) *Kevil* v. *Lynch*, (1873) I. R. 8 Eq. 244.

(*o*) § 9. A will written in pencil has been decided to be a good will; *Dickenson* v. *Dickenson*, (1814) 2 Phill. Ecc. 173; *Re Dyer*, (1828) 1 Hag. Ecc. 219; but not (as decided in America) one written on a slate: *Reed* v. *Woodward*, (1877) 11 Phil. (Pa.) 54, 541. But it may be in the form of a letter if intended to be testamentary and properly executed; *Cowley* v. *Knapp*, (1886) 42 N. J. L. 297 (Am.).

(*p*) § 10. See, however, and compare *Buckell* v. *Bleakhorn*, (1846) 5 Hare, 131; 71 R. R. 45; *Collard* v. *Sampson*, (1853) 4 De G., M. & G. 224; 22 L. J. Ch. 729; 102 R. R. 98; *West* v. *Ray*, (1854) Kay 385; 23 L. J. Ch. 447; 101 R. R. 668; *Taylor* v. *Meads*, (1865) 34 L. J. Ch. 203; 4 De G., J. & S. 597; 146 R. R. 471; and *Smith* v. *Adkins*, (1872) L. R. 14 Eq. 462; 41 L. J. Ch. 628.

(*q*) § 13. As to the meaning of the phrase "publication of a will," see *Vincent* v. *Bp. of Sodor and Man*, (1851) 4 De G. & Sm. 294; 20 L. J. Ch. 433; 87 R. R. 387; and cases there cited.

(*r*) § 12. 11 G. 4 & 1 W. 4, c. 20, ss. 48—50; 28 & 29 V. c. 72; 60 & 61 V. c. 15. See 5 Geo. 5, c. 17, giving power to the Admiralty to dispense with the provisions of 28 & 29 V. c. 72 and 60 and 61 V. c. 15, with regard to seamen or mariners who died during or in consequence of the War.

(*s*) See *In re Stable*, deceased, (1919) P. 7; 88 L. J. P. 32; *In re Yates*, *id*, 93; 88 L. J. P. 92.

(*t*) 29 C. 2, c. 3, s. 5; 7 W. 3, c. 12, s. 3, *Ir.*

of freehold, copyhold, or personal estate; secondly, that two attesting witnesses are sufficient and necessary in all cases, while the Statute of Frauds required the signature of at least three to all devises of freehold realty, but was silent as to other wills; thirdly, that the testator must make or acknowledge (*u*) his signature in the actual contemporaneous presence (*v*) of these witnesses, though this was not necessary under the former Act; and fourthly, that the will must be signed "at the foot or end thereof," whereas, in former wills, the signature was valid, if it appeared on any part of the instrument (*x*). It has been further laid down as a rule deducible from the spirit, if not from the express language, of the Act, that both the attesting witnesses must subscribe the will at the same time, and in each other's presence; and, therefore, where a will was signed in the presence of a single witness who then attested it—and subsequently, the testator, in the presence of this witness and another, acknowledged his signature, whereupon the second witness also subscribed the will—this was held to be insufficient, though on the second occasion the first witness had acknowledged, but had not re-written, his own signature (*y*). So, where one of the witnesses to a will, on the occasion of its being re-executed in his presence, retraced his signature with a dry pen (*z*), and where another witness, under similar circumstances, corrected an error in his name as previously written, and added the date (*a*), the court held that neither of these acts was a sufficient compliance with the statute, which, in requiring the actual subscription of the witnesses, rendered it incumbent on them to do some act that should be apparent on the face of the instrument, and that should amount to such a signature as would be descriptive of the witness, whether by a mark, or by initials, or by writing the full name (*b*).

§ 1053. As the word "presence," mentioned in the statute, means not only a bodily, but a mental, presence, the Act will not be satisfied, if either of the witnesses be insane, intoxicated, asleep, or,

(*u*) See *Morritt* v. *Douglass*, (1872) L. R. 3 P. & D. 1; 42 L. J. P. & M. 10.

(*v*) Presence in the same room is insufficient, but both witnesses must contemporaneously see the testator sign or acknowledge his signature: *Brown* v. *Skirrow*, [1902] P. 3; 71 L. J. P. 19.

(*x*) *Post*, § 1057.

(*y*) *Casement* v. *Fulton*, (1845) 5 Moore P. C. 139; 70 R. R. 19; *Moore* v. *King*, (1842) 3 Curt. 243; *In re* Simmonds, (1842) *id.* 79; *In re* Allen, (1839) 2 Curt. 331; *Slack* v. *Rusteed*, (1856) 6 Ir. Ch. R. 1. See, however, *Faulds* v. *Jackson*, (1845) 6 Ecc. & Mar. Cas. Supp. i.; and *In re* Webb, (1855) 1 Deane, Ecc. 1, in which last case, Sir J. Dodson, on the authority of an unreported decision of Sir H. Fust, in *Chodwick* v. *Palmer*, (1851) held that the witnesses need not subscribe the will in the presence of each other.

(*z*) *Playne* v. *Scriven*, (1845) 1 Rob. Ecc. 772. See *post*, § 1113.

(*a*) *Hindmarsh* v. *Charlton*, (1861) 8 H. L. C. 160; 125 R. R. 86.

(*b*) *In re Enyon*, (1873) L. R. 3 P. & D. 92; 42 L. J. P. & M. 52.

it would seem, even blind (*c*) or inattentive, at the time when the will is signed or acknowledged (*d*); and so strictly has this rule been interpreted, that where a testator had acknowledged a paper to be his will in the presence of witnesses, but these persons had neither seen him sign it, nor seen his signature at the time of their subscription, a prayer for probate was rejected, though both the witnesses admitted that they had seen the testator writing the paper, and the will, when produced, actually bore his signature (*e*).

§ 1054. A somewhat less stringent construction has been put on that part of the Act which requires the witnesses to subscribe in the presence of the testator; and, although, if their signatures were not attached in the testator's room, proof would be required to show that he was in such a position as to have seen them write (*f*), yet where the testator, being in bed, did not exactly see one of the witnesses sign, in consequence of a curtain being drawn, but both the witnesses had really signed in his room, and in each other's presence, the will was admitted to probate (*g*). This distinction has been adopted in consequence of the vast difference which exists in the relative importance of the two acts, and in the objects they are intended to answer. The witnesses are to see the signature made or acknowledged, because they are subsequently to attest it; but they are to subscribe the will in the presence of the testator, chiefly for the purpose of formally completing it; and although they cannot depose to the signature of the testator being made or acknowledged in their presence, unless they see the act, they may bear witness to their subscription in the presence of the testator, though he did not actually see them sign (*h*). An attestation while the alleged testator is insensible is, however, of course bad (*i*).

§ 1055. In enacting that the testator must "make or acknowledge" his signature in the presence of witnesses, the Legislature did not intend to confine the acknowledgment to cases where the signature was made "by some other person" than the testator, but meant it to apply equally to those cases where the signature

(*c*) See *In re Mullen*, (1871) I. R. 5 Eq. 309, where a blind testator was held capable of acknowledging his signature to his will.

(*d*) *Hudson* v. *Parker*, (1844) 1 Rob. Ecc. 24, per Dr. Lushington.

(*e*) *Hudson* v. *Parker*, *supra*; *Blake* v. *Blake*, (1882) 51 L. J. P. 36; 7 P. D. 102. But see *Smith* v. *Smith*, (1868) L. R. 1 P. & D. 143; 35 L. J. P. & M. 65.

(*f*) *Carter* v. *Seaton*, (1901) 85 L. T. 76; *Norton* v. *Barett*, (1856) Deane, Ecc. R. 259. *Ante*, § 163.

(*g*) *Newton* v. *Clarke*, (1839) 2 Curt. 320. But see *Tribe* v. *Tribe*, (1849) 1 Roberts. 775; *In re Killick*, (1865) 3 Sw. & Tr. 578; 34 L. J. P. & M. 2 *Ante*, § 163.

(*h*) *Hudson* v. *Parker*, *supra*.

(*i*) *Right* v. *Price*, (1779) 1 Doug. 241.

had been previously made by himself (*k*). In making the acknowledgment (*l*), it is not necessary that the testator should actually point out to the witness his name, and say, "This is my name or my handwriting"; but if he states that the whole instrument was written by himself (*m*), or if he produces a paper as his will, and requests the witnesses to put their names underneath his (*n*), or if he intimates by gestures that he has signed the will, and that he wishes the witnesses to attest it (*o*), or even, it seems, if he shows a paper in his handwriting to the witnesses and desires, or allows a bystander to desire (*p*), them to sign it, without stating that such paper is his will (*q*), this will be a sufficient acknowledgment of his signature, provided it clearly appears that, at the time of making the statement or producing the document, the signature was really affixed, and was actually seen by the witnesses when they signed at the testator's request. Unless, however, the judge is satisfied that the witnesses, before they subscribed the will, either saw the testator sign it or saw his signature attached to it, he must pronounce against its validity; for the statute requires, not that the will, but that the signature, should be attested (*r*). It follows from this rule, that if the witnesses sign before the testator the will is void, though the testator immediately afterwards affixes his signature in their presence, and though they subsequently seal the document (*s*).

§ 1056. But it is not absolutely essential to the validity of a will that positive affirmative evidence should be given by the subscribing witnesses, that the testator either signed it, or acknowledged his signature to it, in their presence, since the court may *presume due execution* under the circumstances. Thus, where, three years after the supposed execution, the witnesses deposed that they went to the house of the deceased, who, as writer to an attorney, was

(*k*) *In re Cornelius Ryan*, (1838) 1 Curt. 908, recognised in *Ilott* v. *Genge*, (1842) 3 Curt. 174.

(*l*) The acknowledgment *may* be made by a blind testator, *In re Mullen*, (1871) I. R. 5 Eq. 309.

(*m*) *Blake* v. *Knight*, (1843) 3 Curt. 563.

(*n*) *Gaze* v. *Gaze*, (1843) 3 Curt. 451.

(*o*) *In re Davies*, (1849) 2 Rob. Ecc. 377.

(*p*) See *Faulds* v. *Jackson*, (1845) 6 Ecc. & Mar. Cas. Supp. x., per Ld. Brougham; *Inglesant* v. *Inglesant*, (1874) L. R. 3 P. & D. 172; 43 L. J. P. & M. 43.

(*q*) *Keigwin* v. *Keigwin*, (1843) 3 Curt. 607; *In re Ashmore*, (1843) *id.* 758, per Sir H. Fust; *In re Bosanquet*, (1852) 2 Rob. Ecc. 577; *In re Dinmore*, (1853) *id.* 641; *In re Jones*, (1855) Deane, Ecc. 3.

(*r*) *Hudson* v. *Parker*, (1844) 1 Rob. Ecc. 14; *Blake* v. *Blake*, *supra*; *Ilott* v. *Genge*, *supra*; *Countess de Zichy Ferraris* v. *M. of Hertford*, (1843) 3 Curt. 479; *In re Summers*, (1850) 2 Roberts. 295; *In re Pearsons*, (1864) 33 L. J. P. & M. 177; *Fischer* v. *Popham*, (1875) L. R. 3 P. & D. 246; 44 L. J. P. & M. 47.

(*s*) *In re Byrd*, (1842) 3 Curt. 117; *In re Olding*, (1841) 2 *id.* 865; *Cooper* v. *Bockett*, (1844) 3 *id.* 648; 59 R. R. 371; *Burke* v. *Moore*, (1875) I. R. 9 Eq. 609.

presumed to be conversant with business, to see him sign his will; that he then produced a paper, telling them that it was his will and in his handwriting; that he read over the attestation clause, and the introductory words, and pointed out a mistake which had been rectified in the body of the instrument; that he did not sign in their presence; that when they attested the paper no seal was upon it, but they could not positively swear that there was no signature; Sir Herbert Jenner Fust granted probate, though the will, when produced, was not only signed but sealed (*t*). So, also, if the will contains an attestation clause, and purports to be duly signed by the testator and two witnesses, the court will *primâ facie* presume, in the absence or death of the witnesses, or in the event of their not remembering the facts attendant on the execution (*u*), that the statute has been complied with, and that *omnia rite esse acta* (*v*). If, however, one witness assert that he does remember, and positively negatives signing or acknowledgment of signature by the alleged testator in his presence, the document set up cannot be admitted to probate, unless the court from the surrounding circumstances thinks fit to doubt his evidence (*x*). The presumption *omnia praesumuntur rite esse acta* may also be recognised, even in cases where no attestation clause was attached to the will (*y*), and where circumstances existed, which a non-legal mind might well deem sufficiently suspicious to justify a very different inference (*z*).

§ 1057. It was at one time thought, that the clause requiring the testator to sign "at the foot or end" of the testament would be satisfied, though the will itself were wholly written on the first

(*t*) *Blake* v. *Knight*, (1843) 3 Curt. 547, 562. See also *Beckett* v. *Howe*, (1869) L. R. 2 P. & D. 1; 39 L. J. P. & M. 1; *Olver* v. *Johns*, (1870) 39 L. J. P. & M. 7; *Kelly* v. *Keatinge*, I. R. 5 Eq. 174; *In re Janaway*, 44 L. J. P. & M. 6.

(*u*) *Whiting* v. *Turner*, (1903) 89 L. T. 71.

(*v*) *Baxendale* v. *De Valmer*, (1887) 57 L. T. 556; *Wright* v. *Sanderson*, Times, 28 Feb., 1884; *Burgoyne* v. *Showler*, (1844) 1 Rob. Ecc. 5; *Hitch* v. *Wells*, (1846) 10 Beav. 84; *In re Leach*, (1848) 6 Ecc. & Mar. Cas. 92; *Leech* v. *Bates*, (1849) 1 Rob. Ecc. 714; *In re Rees*, (1865) 34 L. J. P. & M. 56; *Brenchley* v. *Still*, (1850) 2 Rob. Ecc. 162, 175—177; *Thomson* v. *Hall*, (1852) 2 *id.* 426; *In re Holgate*, (1849) 1 Sw. & Tr. 261; *Lloyd* v. *Roberts*, (1858) 12 Moore P. C. 158; *Foot* v. *Stanton*, (1856) Deane, Ecc. R. 19; *Reeves* v. *Lindsay*, (1869) I. R. 3 Eq. 509; *Vinnicombe* v. *Butler*, (1865) 34 L. J. P. & M. 18; 3 Sw. & Tr. 580, S. C.; *Smith* v. *Smith*, (1866) L. R. 1 P. & D. 143; 35 L. J. P. & M. 65; *O'Meagher* v. *O'Meagher*, (1883) 11 L. R. Ir. 117. See *Croft* v. *Croft*, (1865) 4 Sw. & Tr. 10; 34 L. J. P. & M. 44; and *Wright* v. *Rogers*, (1869) L. R. 1 P. & D. 678; 38 L. J. P. & M. 67.

(*x*) *Lloyd* v. *Roberts*, *supra*; *Bailey* v. *Frowan*, (1871) 19 W. R. 511; *Myers* v. *Gibson*, (1866) 14 W. R. 901; *O'Meagher* v. *O'Meagher*, (1883) 11 L. R. Ir. 117.

(*y*) *In re Peverett*, [1902] P. 205; 71 L. J. P. 114; *In re Thomas*, (1859) 1 Sw. & Tr. 255; 28 L. J. P. M. 33, per Sir C. Cresswell; *Gwillim* v. *Gwillim*, (1860) 29 L. J. P. & M. 31; 3 Sw. & Tr. 200; *Vinnicombe* v. *Butler*, *supra*.

(*z*) *Trott* v. *Skidmore*, (1860) 2 Sw. & Tr. 12; *In re Huckvale*, (1867) L. R. 1 P. & D. 375; 36 L. J. P. & M. 84; *In re Pearn*, (1875) 45 L. J. P. & M. 31; 1 P. D. 70. But see *Pearson* v. *Pearson*, (1872) L. R. 2 P. & D. 451; 40 L. J. P. & M. 53.

side of a sheet of paper, and the attestation and signature were attached to the second, or even the third side (*a*). This view of the law has constantly been entertained by the judges in Ireland (*b*); but in England a far more strict construction was ultimately put upon the words of the Act, and the consequence was that very many wills were refused probate, because the testator had inadvertently permitted a trifling blank space to be interposed between the final word of the instrument and his signature (*c*). The mischiefs caused by this interpretation of the statute became at last so serious as to require the interference of the Legislature; and in 1852, Lord Chancellor St. Leonards obtained the assent of Parliament to an Act (*d*), which has had the effect of remedying the principal evils that arose from the former law.

§ 1058. The first section of this Act,—after reciting that, under the statute 7 W. 4 & 1 V., c. 26, no will is valid unless it be "signed at the foot or end thereof by the testator, or by some person in his presence, and by his direction,"—goes on to enact, that "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite (*e*) to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*f*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank

(*a*) *In re Gore*, (1843) 3 Curt. 758; *In re Carver*, (1842) *id.* 29.

(*b*) *Derinzy* v. *Turner*, (1851) 1 Ir. Ch. R. 341.

(*c*) See *Smee* v. *Bryer*, (1848) 6 Moore, P. C. 404; *In re Howell*, (1848) 6 Ecc. & Mar. Cas. 555; *In re Corder*, (1848) *id.* 556; *In re Attridge*, (1848) *id.* 597. Where the testator signed the will between the testimonium clause and certain words descriptive merely of the witnesses, probate was granted: *In re Cotton*, (1848) 6 Ecc. & Mar. Cas. 307. See also *In re Beadle*, (1849) 1 Rob. Ecc. 749; *In re Standley*, (1849) 1 Rob. Ecc. 755; *In re Brown*, (1849) 1 Rob. Ecc. 710; *In re Banly*, (1849) *id.* 751; *In re Hellings*, (1849) *id.* 753; *In re Hearn*, (1849) 2 Roberts, 112; *In re Odell*, (1849) 7 Ecc. & Mar. Cas. 267—271; *In re Batten*, (1849) 2 Rob. Ecc. 124; *Holbeck* v. *Holbeck*, (1849) 2 Rob. Ecc. 126; *In re Minty*, (1850) 7 Ecc. & Mar. Cas. 374—378; cases collected, id. 543—552; *In re Hill*, (1849) 2 Rob. Ecc. 114; *In re White*, (1850) *id.* 194.

(*d*) 15 & 16 V. c. 24.

(*e*) *In re Williams*, (1865) L. R. 1 P. & D. 4; 35 L. J. P. & M. 2; *In re Coombs*, (1866) 36 L. J. P. & M. 25; L. R. 1 P. & D. 302.

(*f*) See *Cook* v. *Lambert*, (1863) 32 L. J. P. & M. 93; 3 Sw. & Tr. 46; where a signature written on a piece of paper, which had been previously wafered to the foot of the will, was held sufficient. See also *In re Gausden*, (1863) 2 Sw. & Tr. 362; 31 L. J. P. & M. 53; *In re Hammond*, (1862) 3 *id.* 90; 32 L. J. P. & M. 200; *In re West*, (1862) 32 L. J. P. & M. 182; *In re Wright*, (1865) 34 L. J. P. & M. 104; 4 Sw. & Tr. 35, S. C. But see *In re M'Key*, (1876) I. R. 11 Eq. 220.

space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*g*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after (*h*), or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature (*i*), or by the circumstance that there shall appear to be sufficient space on or at the preceding side, or page, or other portion of the same paper on which the will is written, to contain the signature (*k*); and the enumeration of the above circumstances shall not restrict the generality of the above enactment (*l*); but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath (*m*) or which follows it (*n*), nor shall it give effect to any disposition or direction inserted after the signature shall be made" (*o*). Where a will, written on several pages of paper, has been signed and witnessed at the foot of the first page only, that page has been admitted to probate (*p*).

§ 1059. Although the testator for obvious reasons is required to sign the will "at the foot thereof," it is somewhat remarkable that the Wills Act points out no place for the signature of the witnesses. The most convenient, and therefore the most proper, place undoubtedly is under, or by the side of, the signature of the testator; but the selection of such a locality is by no means essential; and the testament has been deemed duly executed, even where the attestation clause and the signatures of the witnesses were endorsed upon it (*q*). The Court, however, in all these cases must be satisfied

(*g*) *In re Mann*, (1859) 28 L. J. P. & M. 19; *In re Casmore*, (1869) L. R. 1 P. & D. 653; 38 L. J. P. & M. 54.

(*h*) *In re Puddephatt*, (1870) L. R. 2 P. & D. 97; 39 L. J. P. & M. 84; *In re Jones*, (1877) 46 L. J. P. 80.

(*i*) *In re Archer*, (1871) L. R. 2 P. & D. 252; 40 L. J. P. & M. 80.

(*k*) *Hunt* v. *Hunt*, (1866) L. R. 1 P. & D. 209; 35 L. J. P. & M. 135; *In re Rice*, (1870) I. R. 5 Eq. 176.

(*l*) See *In re Wotton*, (1874) L. R. 3 P. & D. 159; 43 L. J. P. & M. 14.

(*m*) See *In re Kimpton*, (1864) 33 L. J. P. & M. 153; 3 Sw. & Tr. 427; *In re Woodley*, (1864) 3 Sw. & Tr. 429; 33 L. J. P. & M. 153; *In re Jones*, (1864) 4 Sw. & Tr. 1; *In re Powell*, (1864) 34 L. J. P. & M. 107; 4 Sw. & Tr. 34; *In re Ainsworth*, (1870) L. R. 2 P. & D. 151.

(*n*) See *Sweetland* v. *Sweetland*, (1865) 4 Sw. & Tr. 6; 34 L. J. P. & M. 42; *In re Birt*, (1871) L. R. 2 P. & D. 214; 40 L. J. P. & M. 26; *In re Dilkes*, (1874) L. R. 3 P. & D. 166; 43 L. J. P. & M. 38 S. C.; *Royle* v. *Harris*, [1895] P. 163; 64 L. J. P. 65.

(*o*) These provisions apply to wills already made, see s. 2.

(*p*) *Milward* v. *Buswell*, (1904) 20 Times R. 714.

(*q*) *In re Chamney*, (1849) 1 Rob. Ecc. 757. See *In re Taylor*, (1851) 2 Roberts. 411.

that the signatures, wherever placed, were really intended to attest the operative signature of the testator (*r*).

§ 1060. Under the Wills Act of 1838, as under the Statute of Frauds, the testator may have his hand guided by another person (*s*), or he may sign by his mark or initials only (*t*), though his name does not appear, or though a wrong name does by mistake appear (*u*), in the body of the will (*v*); and the attesting witnesses, whether they can write or not, may also sign as marksmen (*x*); and if one of them can neither read nor write, he may still sign his name by having his hand guided by the other (*y*). It has even been held sufficient for witnesses to subscribe the will by their initials (*z*). In conformity also with the provisions in the Wills Act that "no form of attestation shall be necessary," it has been held, that a mere subscription of two names, without any memorandum to show that the parties have subscribed as witnesses, will satisfy the requirements of the statute (*a*). Even writing their names in its margin opposite to alterations, &c., in a will, where the Court is satisfied that it was done with intent to attest it, is a sufficient attestation (*b*). Again, under either Act, any person, even though he be one of the two attesting witnesses, may write (*c*), or even stamp (*d*), the testator's

(*r*) *Phipps* v. *Hale*, (1874) L. R. 3 P. & D. 166.

(*s*) *Wilson* v. *Beddard*, (1846) 12 Sim. 28.

(*t*) *Baker* v. *Dening*, (1838) 8 A. & E. 94; 7 L. J. Q. B. 137; 47 R. R. 502; *In re Blewitt*, (1880) 5 P. D. 116; 49 L. J. P. 31. Where a testator has signed by a mark, no collateral inquiry will be allowed as to his capacity to have written his name, *id.*; and no proof is required that the will was read over to him: *Clarke* v. *Clarke*, (1868) I. R., 2 C. L. 395. Sealing a will is not a sufficient signing: *Smith* v. *Evans*, (1851) 1 Wils. 313; *Grayson* v. *Atkinson*, (1752) 2 Ves. Sen. 459.

(*u*) *In re Douce*, (1862) 2 Sw. & Tr. 593; 31 L. J. P. & M. 172; *In re Clarke*, (1858) 1 Sw. & Tr. 22; 27 L. J. P. & M. 18.

(*v*) *In re Bryce*, (1839) 2 Curt. 325.

(*x*) *In re Amiss*, (1849) 2 Rob. Ecc. 116; *Clarke* v. *Clarke*, (1879) 3 L. R., Ir. 306; S. C. on App., 5 L. R. Ir. 57. But an attesting witness cannot subscribe a will in another person's name; *Pryor* v. *Pryor*, (1860) 29 L. J. P. & M. 114.

(*y*) *Harrison* v. *Elvin*, (1842) 3 Q. B. 117; 11 L. J. Q. B. 197; 61 R. R. 153; *In re Lewis*, (1862) 31 L. J. P. & M. 153; *In re Frith*, (1858) 27 L. J. P. & M. 6; 1 Sw. & Tr. 8; *Lewis* v. *Lewis*, (1861) 2 Sw. & Tr. 153; 30 L. J. P. & M. 199; *Roberts* v. *Phillips*, (1855) 4 E. & B. 450; 24 L. J. Q. B. 171; 99 R. R. 553.

(*z*) *In re Christian*, (1849); 2 Roberts. 110; *In re Blewitt*, (1880) 49 L. J. P. 31; 5 P. D. 116. See *In re Trevanion*, (1850) 2 Rob. Ecc. 311; *Hindmarsh* v. *Charlton*, 8 H. L. C. 160; 125 R. R. 86, cited *ante*, § 1052. See, too, *In re Sperling*, (1864) 33 L. J. P. & M. 25, where a witness, instead of signing his name, wrote "servant to M. S." and this was held sufficient; 3 Sw. & Tr. 272. But where an infirm witness, intending to sign his name, could only write "Saml." and omitted his surname, the signature was held to be insufficient; *In re Maddock*, (1874) L. R. 3 P. & D. 169; 43 L. J. P. & M. 29.

(*a*) *Bryan* v. *White*, (1850) 2 Rob. Ecc. 315. See *Griffiths* v. *Griffiths*, (1871) L. R. 2 P. & D. 300; 41 L. J. P. & M. 11.

(*b*) *In the goods of Streathley*, [1891] P. 172; 60 L. J. P. 56.

(*c*) *Smith* v. *Harris*, (1845) 1 Rob. Ecc. 262; *In re Bailey*, (1838) 1 Curt. 914.

(*d*) *Jenkins* v. *Gaisford*, (1863) 32 L. J. P. & M. 122; 3 Sw. & Tr. 93. See *Bennett* v. *Brumfitt*, (1867) L. R. 3 C. P. 28; 37 L. J. C. P. 25; and *ante*, § 1029.

signature by his direction; and where the drawer of a will, being requested by the testator to sign for him, put his own signature to the instrument, this was held to be sufficient, as the Act does not say that the signature must bear the testator's name (*e*). The witnesses, however, must attest the will, either by their signature or their marks, and probate has been refused when a stranger, at the request of the testator, had signed for one of the witnesses who was unable to write (*f*).

§ 1061. It may be stated, with regard to the incorporation of papers in wills, that here, as in other documents, a paper imperfect in itself may, by clear reference to it as an existing document (*g*), be so identified with an instrument validly executed as to form part of it, and if this be the case, the defect of authentication arising from such paper being unattested or unexecuted will be cured (*h*). Unattested wills and codicils have thus constantly been set up by subsequent attested codicils which have confirmed them (*i*). Where, however, a testator at the foot of a valid will of 1833 made two codicils prior to January 1, 1838, and five more after that date, the whole seven being unattested, and then in 1847 duly executed an eighth codicil on a separate paper, which he described as "a codicil to his will," the court held that the five unattested codicils, which bore date after the passing of the Wills Act, were not rendered valid by the eighth codicil, as they formed no part of the testator's will, legally and technically speaking (*k*).

(*e*) *In re Clark*, (1839) 2 Curt. 329. See also *In re Blair*, (1848) 6 Ecc. & Mar Cas. 528.

(*f*) *In re Cope*, (1850) 2 Rob. Ecc. 335; *In re Duggins*, (1870) 39 L. J. P. & M. 24.

(*g*) *Singleton* v. *Tomlinson*, (1878) 3 App. Cas. 404; *In re Kehoe*, (1884) 13 L. R. Ir. 13; *Dickinson* v. *Stidolph*, (1861) 11 C. B. (N. S.) 341; 132 R. R. 575; *Van Straubenzee* v. *Monck*, (1863) 32 L. J. P. & M. 21; 3 Sw. & Tr. 6; *In re Greves*, (1859) 28 L. J. P. & M. 28; 1 Sw. & Tr. 250; *Allen* v. *Maddock*, (1858) 11 Moore, P. C. 427; 117 R. R. 62; *In re Almosnino*, (1860) 29 L. J. P. & M. 46; 1 Sw. & Tr. 508; *In re Brewis*, (1864) 33 L. J. P. & M. 124; 3 Sw. & Tr. 473; *In re Luke*, (1865) 34 L. J. P. & M. 105; *In re Lady Truro*, (1866) L. R. 1 P. & D. 201; 35 L. J. P. & M. 89; *In re Sunderland*, (1866) L. R. 1 P. & D. 198; 35 L. J. P. & M. 82; *In re Watkins*, (1865) L. R. 1 P. & D. 19; 35 L. J. P. & M. 14; *In re Dallow*, (1866) L. R. 1 P. & D. 189; 35 L. J. P. & M. 81. See *post*, § 1195, *ad. fin.*

(*h*) *Countess de Zichy Ferraris* v. *M. of Hertford*, (1843) 3 Curt. 493; *In re Lady Durham*, (1842) *id.* 57; *In re Dickins*, (1842) *id.* 60; *In re Willesford*, (1842) *id.* 77; *Habergham* v. *Vincent*, (1793) 2 Ves. 204; *In re Edwards*, (1848) 6 Ecc. & Mar. Cas. 306; *In re Ash*, (1856) Deane, Ecc. 181; *In re Lady Pembroke*, (1856) *id.* 182; *In re Stewart*, (1863) 4 Sw. & Tr. 211; 32 L. J. P. & M. 94. See *ante*, § 1026.

(*i*) *Aaron* v. *Aaron*, (1849) 3 De G. & Sm. 475; 84 R. R. 374; *Utterton* v. *Robins*, (1834) 1 A. & E. 423; 40 R. R. 326; *Gordon* v. *Ld. Reay*, (1832) 5 Sim. 274; 35 R. R. 160; *Doe* v. *Evans*, (1832) 1 Cr. & M. 42; 2 L. J. Ex. 39; 38 R. R. 579; *Allen* v. *Maddock*, *supra*; *In goods of Heathcote*, (1881) 6 P. D. 30; 50 L. J. P. 42, S. C. See *In re Allnutt*, (1864) 33 L. J. P. & M. 86; *Anderson* v. *Anderson*, (1872) 41 L. J. Ch. 247; L. R. 13 Eq. 381; and especially *Burton* v. *Newbery*, (1875) 1 Ch. D. 234; 45 L. J. Ch. 202; and *Green* v. *Tribe*, (1878) 9 Ch. D. 231; 47 L. J. Ch. 783.

(*k*) *Haynes* v. *Hill*, (1849) 7 Ecc. & Mar. Cas. 256. See also *Johnson* v. *Ball*, (1851) 5 De G. & Sm. 85; 21 L. J. Ch. 210; 90 R. R. 19; *In re Drummond*, (1880)

§ 1062. With respect to section 11, which excepts from the operation of the Act all wills of personal estate made by "any soldier being in actual military service, or any mariner or seaman being at sea," reference should be made to the Wills (Soldiers and Sailors) Act, 1918, under which a soldier or sailor may also dispose of real estate by privileged will (*l*). The privilege, as to soldiers, is confined to such as are actually on an expedition (*m*); and, consequently, that officers quartered with their regiments in barracks, or otherwise forming part of a stationary force, whether at home or in the colonies, are not within the exception (*n*); but a soldier has been held to be sufficiently "*in expeditione*" who has taken some step under orders, in view of, and preparatory to joining the force in the field (*o*), and even where the force to which he belongs has been ordered to mobilise for service in the field, although the particular soldier himself has taken no step under the order (*p*). A declaration made by a soldier on active service at the instance of the military authorities, who made a note of it at the time, that he desired his effects to be credited to a named person in the event of his death, has been held to be a valid testamentary document (*q*). The Act applies to seamen in the merchant, as well as in the King's service (*r*), and the purser of a man-of-war (*s*) and a surgeon in the Navy (*t*) are both included in the term "seamen." The exception extends to an invalided seaman, who is returning home from foreign service in a passenger ship (*u*), and also to a naval captain on board a King's ship in a river, provided he be actually engaged in a naval expedition (*v*); but it does not extend to an admiral in command of

2 Sw. & Tr. 8; *In re Tovey*, (1878) 1 P. D. 150; 47 L. J. P. 63; *Stockil* v. *Punshon*, (1880) 6 P. D. 9; 50 L. J. Pr. 14; *In re Mathias*, (1863) 32 L. J. P. & M. 115; 3 Sw. & Tr. 100; *In re Wyatt*, (1862) 2 Sw. & Tr. 494; 31 L. J. P. & M. 197; *In re Lady Truro*, (1862) 35 L. J. P. & M. 89; *In re Hall*, (1871) L. R. 2 P. & D. 256; 40 L. J. P. & M. 37.

(*l*) See *supra*, § 1051.

(*m*) See *Herbert* v. *Herbert*, (1855) Deane, Ecc. 10.

(*n*) *Drummond* v. *Parish*, (1843) 3 Curt. 522, 542; *In re Hill*, (1845) 1 Rob. Ecc. 276; *White* v. *Repton*, (1844) 3 Curt. 818; *Bowles* v. *Jackson*, (1854) 1 Ecc. & Mar. Cas. 294.

(*o*) *In re Hiscock*, [1901] P. 78; 70 L. J. P. 22. In *In re Stanley*, [1916] P. 192; 85 L. J. P. 222, it was held that a document written by a nurse (employed under a contract with the War Office) during an interval of leave in England, but after orders to re-embark had been received, might be admitted to probate.

(*p*) *Gattward* v. *Knee*, [1902] P. 99; 71 L. J. P. 34; *May* v. *May*, [1902] P. 103*n*. See also *In the Estate of Anderson*, [1916] P. 49; 85 L. J. P. 21; 32 Times L. R. 248.

(*q*) *In re Scott*, [1903] P. 243; 73 L. J. P. 17.

(*r*) *In re Milligan*, (1849) 2 Rob. Ecc. 108.

(*s*) *In re Hayes*, (1839) 9 Curt. 338.

(*t*) *In re Saunders*, (1865) L. R. 1 P. & D. 16; 35 L. J. P. & M. 26.

(*u*) *Id.*

(*v*) *In re Admiral Austen*, (1853) 3 Roberts. 611; *In re M'Murdo*, (1867) L. R. 1 P. & D. 540; 37 L. J. P. & M. 14, where the exception was held to apply to a mate, who was on board a ship permanently stationed in Portsmouth Harbour. *In re*

a fleet in the colonies, who lives with his family on shore at his official residence (*x*). It has further been held, with respect to soldiers' wills, that material alterations contained in them may, in the absence of evidence, be presumed to have been made while the respective testators were employed in actual military service (*y*).

§ 1062A. When the Wills Act first came into operation, it was held to apply to the testamentary papers of all domiciled Englishmen excepting those specified in the last section, even when such papers were executed in foreign countries (*z*); but this law being found in practice productive of injustice, the Legislature interfered in 1861, and applied a remedy for the evil by passing the Act of 24 & 25 V. c. 114. Section 1 of that statute enacts, in substance, that every will made out of the United Kingdom by a British subject, whatever his domicile may be, shall, as regards personal estate, be entitled to probate, if made according to the forms required either by the law of the place where it was made, or by the law of the place where the testator was domiciled (*a*).

§ 1063. The Wills Act further provides, with respect to revocation, "that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled, as his or her next of kin, under the Statute of Distributions" (*b*); and "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances" (*c*); and "that no will, or codicil (*d*), or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil

Patterson, (1898) 79 L. T. 123; where the exception was held to apply to a seaman in a ship lying in a river preparatory to sailing to sea.

(*x*) *Ld. Euston* v. *Ld. Seymour*, (1802) cited 2 Curt. 339, and recognised in *Drummond* v. *Parish*, (1843) 3 Curt. 530. See also *In re Anderson*, [1916] P. 49; 85 L. J. P. 21.

(*y*) *In re Tweedale*, (1874) L. R. 3 P. & D. 204; 44 L. J. P. & M. 35.

(*z*) *Croker* v. *M. of Hertford*, (1844) 4 Moore, P. C. 339.

(*a*) The Act only applies to such persons: *In goods of Keller*, (1891) 61 L. J. P. 39. It does not apply to a person who, though his domicile of origin was English, was at his death domiciled in Germany, leaving a will in English form; *Bloxam* v. *Favre*, (1884) 8 P. D. 101; 53 L. J. P. 26. It was stated in *Re Kirwan's Trusts*, (1883) 25 Ch. D. 373; 52 L. J. Ch. 952, that the enactment did not apply to a testamentary exercise of a power, but this *dictum* was disapproved in *Re Simpson*, [1916] 1 Ch. 502; 85 L. J. Ch. 329; *Re Wilkinson*, [1917] 1 Ch. 620; 86 L. J. Ch. 511; *Re Lewal*, [1918] 2 Ch. 391; 87 L. J. Ch. 588.

(*b*) 7 W. 4 & 1 V. c. 26, s. 18. See *In re Sir C. Fitzroy*, (1858) 1 Sw. & Tr. 133; *Re M'Vicar*, (1869) L. R. 1 P. & D. 671; 38 L. J. P. & M. 84.

(*c*) S. 19. Or by any change of domicile, 24 & 25 V. c. 114, s. 3.

(*d*) *In re Turner*, (1872) L. R. 2 P. & D. 403. See *ante*, § 165.

executed in manner hereinbefore required (*e*), or by some writing declaring an intention to revoke the same (*f*), and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same " (*g*). Where a testator had destroyed his will on the supposition that he had substituted another for it, but the latter instrument turned out to be invalid as not being duly executed, the court held that a copy of the first will was entitled to probate (*h*). With respect to the re-execution of a will, in which alterations have been made, it cannot be too well understood that a tracing by a testator with a dry pen over his former signature in the presence of witnesses cannot be regarded as equivalent to a re-signature (*i*).

§ 1064. In order to revoke a former will by a later one, no revocation clause is necessary; but any paper duly executed, by which the testator disposes of his whole property, is,—except under very special circumstances (*k*)—a revocation *in toto* of all previous wills. This doctrine has been held applicable, even where the last testamentary paper contained no appointment of executors (*l*); and in one case, where a testator by his "last will," in which executors were appointed, disposed of part of his personalty, a former will was held to be revoked, though it contained provisions not wholly inconsistent with the later instrument (*m*). The onus of establish-

(*e*) *Ante*, § 1050.

(*f*) *De Pontès* v. *Kendall*, (1862) 31 L. J. Ch. 185. See *In re Hicks*, (1869) L. R. 1 P. & D. 683; 38 L. J. P. & M. 65; *In re Fraser*, (1859) L. R. 2 P. & D. 40; 39 L. J. P. & M. 20; *In re Durance*, (1812) L. R. 2 P. & D. 406; 41 L. J. P. & M. 60. A verbal authority, given by a Hindu testator to another person to destroy his will, will revoke the instrument, even though it be not destroyed; *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*, (1877) L. R. 4 Ind. App. 228.

(*g*) S. 20. See *Mills v. Milward*, (1890) 15 P. D. 20.

(*h*) *Scott* v. *Scott*, (1859) 1 Sw. & Tr. 258; *Clarkson* v. *Clarkson*, (1862) 31 L. J. P. & M. 143; 2 Sw. & Tr. 497; *Giles* v. *Warren*, (1872) L. R. 2 P. & D. 401; 41 L. J. P. & M. 59; *Dancer* v. *Crabb*, (1873) L. R. 3 P. & D. 98; *Powell* v. *Powell*, (1866) L. R. 1 P. & D. 209; 35 L. J. P. & M. 100; overruling *Dickinson* v. *Swatman*, (1851) 30 L. J. P. & M. 84; 4 Sw. & Tr. 205. See *Eckersley* v. *Platt*, (1866) L. R. 1 P. & D. 281; 36 L. J. P. & M. 7; *Re Weston*, (1869) L. R. 1 P. & D. 633; 38 L. J. P. & M. 53; and *post*, § 1070.

(*i*) *In re Cunningham*, (1860) 29 L. J. P. & M. 71; 4 Sw. & Tr. 194.

(*k*) See *O'Leary* v. *Douglass*, (1878) 1 L. R. Ir. 45.

(*l*) *Henfrey* v. *Henfrey*, (1842) 4 Moore, P. C. 29; 59 R. R. 381.

(*m*) *Plenty* v. *West*, (1845) 1 Rob. Ecc. 264. See also S. C. in Ch. before Romilly, M.R., 22 L. J. Ch. 185. Little, if any, weight, however, can now be attached to this decision; for, in the first place, it appears clear that the phrase "last will" will simply be regarded as one of form; *Stoddart* v. *Grant*, (1851) 1 Macq. H. L. 1851; *Freeman* v. *Freeman*, (1854) 5 De G. M. & G. 704; 23 L. J. Ch. 838; 104 R. R. 245; and next, it must be borne in mind that, according to a maxim which has received the solemn sanction of the court of last resort, a former will cannot be revoked by one of later date, unless the later instrument contains a

ing the revocation lies on the party who impeaches the first will; and no inference in his favour can be drawn from the mere fact that the later instrument contains equivocal expressions, or that the legacies bequeathed by it are *partially* inconsistent with prior testamentary dispositions (*n*). Still, if the two documents taken together would dispose of property far larger than that possessed by the testator, that fact in itself would raise a fair inference that the first was intended to be revoked by the second (*o*); and indeed, in every inquiry of this nature, if any real ambiguity can be shown to exist respecting the testator's intentions, recourse may be had to parol evidence to clear up the doubt (*p*).

§ 1065. Where a jury found that a second will, which was not produced, contained a different disposition of real estate from a former one, "but in what particulars is unknown," the House of Lords, on writ of error, decided that the first will was not revoked, so as to let in the title of the heir at law (*q*). In another case, where a testator, many years after making a will of personal property, executed another paper, which was proved to have commenced with the words "This is the last will and testament," but its further contents were utterly unknown, and after the testator's death it was not forthcoming, the judicial committee of the Privy Council held that the prior will remained unrevoked, and was entitled to probate (*r*). A general clause in a will revoking all former wills does not of itself necessarily operate to revoke a will made in execution of a power (*s*); though it will be held to have that effect, unless such

clause of express revocation, or unless the two wills are incapable of standing together: *Stoddart* v. *Grant*. See *Williams* v. *Williams*, (1877) 8 Ch. D. 789; 47 L. J. Ch. 857; *In re Graham*, (1863) 3 Sw. & Tr. 69; 32 L. J. P. & M. 113; *Dempsey* v. *Lawson*, (1877) 2 P. D. 98; 46 L. J. P. 23; *Shiel* v. *O'Brien*, (1872) I. R. 7 Eq. 64; *Leslie* v. *Leslie*, (1872) I. R. 6 Eq. 332; *Lamage* v. *Goodban*, (1865) L. R. 1 P. & D. 57; 35 L. J. P. & M. 28; *In re Fenwick*, (1867) L. R. 1 P. & D. 319; 36 L. J. P. & M. 54; *Greaves* v. *Price*, (1863) 3 Sw. & Tr. 71; 32 L. J. P. & M. 113; *Birks* v. *Birks*, (1865) 4 Sw. & Tr. 71; 34 L. J. P. & M. 90; *In re Petchell*, (1874) 43 L. J. P. & M. 22; *Re Macfarlane*, (1884) 13 L. R. Ir. 264.

(*n*) *Stoddart* v. *Grant*, *supra*. See, also, *Doe d. Hearle* v. *Hicks*, (1831) 1 Cl. & F. 20; 36 R. R. 1; *Wallace* v. *Seymour*, (1871) Ir. 6 C. L. 196, 219, and 343; *Doe* v. *Ward*, (1852) 18 Q. B. 197; 21 L. J. Q. B. 145; *Williams* v. *Evans*, (1853) 1 E. & B. 727; 22 L. J. Q. B. 241; 93 R. R. 362; *Freeman* v. *Freeman*, *supra*.

(*o*) *Jenner* v. *Ffinch*, (1879) 49 L. J. P. 25, 27; 5 P. D. 106.

(*p*) *Id.* *Allen* v. *Maddock*, (1858) 11 Moore P. C. 477; 117 R. R. 62; *Doe* d. *Shallcross* v. *Palmer*, (1851) 16 Q. B. 747; 20 L. J. Q. B. 367; 83 R. R. 716; *Dench* v. *Dench*, (1877) 2 P. D. 64; 46 L. J. P. 13; *Re Horsford*, (1874) L. R. 3 P. & D. 211; 44 L. J. P. & M. 9; *Sugden* v *Lord St. Leonards*, (1876) 1 P. D. 154; 45 L. J. P. 49; *Gould* v. *Lakes*, (1880) 6 P. D. 1.

(*q*) *Goodright* v. *Harwood*, (1774) 3 Wils. 497. See *Thomas* v. *Evans*, (1802) 2 East, 488; *Brown* v. *Brown*, (1858) 8 E. & B. 876; 27 L. J. Q. B. 173; 112 R. R. 813; *Dickinson* v. *Stidolph*, (1861) 11 C. B. (N.S.) 341, 357; 132 R. R. 575; *In re Brown*, (1858) 1 Sw. & Tr. 32.

(*r*) *Cutto* v. *Gilbert*, (1854) 9 Moore P. C. 131; 105 R. R. 31.

(*s*) *In re Merritt*, (1858) 1 Sw. & Tr. 112.

a result can be shown to be utterly unreasonable (*t*). It would seem that the re-execution of a will, even though it contain a clause of revocation, will not in general be deemed to have revoked any of its codicils; for, unless the contrary appear to have been the intention of the testator, the Court will hold, that all the codicils have been republished by the re-execution of the principal instrument (*u*).

§ 1066. With respect to the revocation of a will by its destruction, it should be observed that a testator cannot revoke his will by authorising any person to destroy it out of his presence; and it follows as a corollary from this proposition, that he has no power to make his will contingent, by giving authority even by the will itself to any person to destroy it after his death (*v*).

§ 1067. It is difficult to fix *à priori* what extent of burning or tearing will amount to the revocation of a will. It is clear that the revocation will not be complete, unless the act of spoliation be deliberately done upon the instrument, in the belief that it is a valid will (*x*), and *animo revocandi* (*y*). This is expressly rendered necessary by the Wills Act (*z*), and was impliedly required by the statute of Charles (*a*). It is further clear, that the burthen of showing that a once valid will has been revoked by mutilation, will lie upon the party who sets up the revocation of the instrument (*b*). There may, however, be a partial revocation (*c*). Moreover, it seems plain, on general principle, that the declarations of the testator, accompanying the act of spoliation,—unlike those which he may subsequently make (*d*),—will be admissible in evidence as explanatory of his intention (*e*). Still the question remains, Must there be a total or substantial burning or tearing of the writing itself, or will the revocation be complete, if the testator, intending to revoke, tears or burns a portion of the paper on which the will is written,

(*t*) *Sotheran* v. *Dening*, (1881) 20 Ch. D. 99.

(*u*) *Wade* v. *Nazer*, (1848) 6 Ecc. & Mar. Cas. 46. See *In re De la Saussaye*, (1873) L. R. 3 P. & D. 42; 42 L. J. P. & M. 47.

(*v*) *Stockwell* v. *Ritherdon*, (1848) 6 Ecc. & Mar. Cas. 409, 414.

(*x*) *Giles* v. *Warren*, (1872) 41 L. J. P. & M. 59; L. R. 2 P. & D. 401.

(*y*) See *In re Cockayne*, (1856) Deane, Ecc. 177.

(*z*) *Ante*, § 1063.

(*a*) *Bibb* v. *Thomas*, (1776) 2 W. Bl. 1044.

(*b*) *Harris* v. *Berrall*, (1858) 1 Sw. & Tr. 153; *Benson* v. *Benson*, (1870) L. R. 2 P. & D. 172; 40 L. J. P. & M. 1; L. R. 2 P. & D. 172.

(*c*) *In goods of Leach*, (1890) 63 L. T. 191; *Brooke* v. *Kent*, (1840) 3 Moore P. C. 341; 50 R. R. 59.

(*d*) *Staines* v. *Stewart*, (1862) 31 L. J. P. & M. 10; 2 Sw. & Tr. 320. But see *Cheese* v. *Lovejoy*, (1877) 46 L. J. P. 66; 2 P. D. 251.

(*e*) *Dan* v. *Brown*, (1825) 4 Cowen, 490; *Clarke* v. *Scripps*, (1852) 2 Rob. Ecc. 568; *Re Horsford*, (1874) *supra*; *Doe* d. *Shallcross* v. *Palmer*, *supra*; *Dench* v. *Dench*, *supra*.

but does not destroy or deface any part of the writing? (*f*) In an old case, where the testator, having given the will "something of a rip with his hands, and having torn it so as almost to tear a bit off," rumpled it up and threw it into the fire, but a bystander saved it without his knowledge, before, as it seems, it was at all burnt, the court held that the revocation was complete (*g*). However, it has since been doubted whether the proof given in that case was sufficient to satisfy the statute (*h*); and where a testator, being angry with the devisee, began to tear his will, and had actually torn it into four pieces before he was pacified; but afterwards he fitted together, and put by, the several pieces, saying he was glad it was no worse; the court refused to disturb a verdict by which the jury had found that the act of cancellation was incomplete, as the testator, had he not been stopped, would have gone further in the process of destruction (*i*).

§ 1068. The cutting out the signature by the testator has been held to effect a revocation of the will, if not under the word "tearing," at least under the terms "or otherwise destroying the same" (*k*). Even the act of tearing off the seal from a will, which had needlessly been executed as a sealed instrument, has been deemed sufficient both in England and in America to destroy the will in its entirety, and to effect its revocation (*l*). Where, however, a will was found in a mutilated state, being both torn and cut, but the signatures of the testator and the attesting witnesses remained uninjured, the court, guided by the peculiar nature of the mutilations, held, in the absence of any extrinsic evidence, that the instrument was not revoked (*m*).

§ 1069. The Wills Act,—unlike the Statute of Frauds,—omits all mention of "cancelling" as one of the modes of revoking a will (*n*); and with respect to obliterating, it enacts, in section 21, "that no obliteration, or interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect,

(*f*) See *Doe* v. *Harris*, (1837) 6 A. & E. 215-218; 6 L. J. K. B. 84; 45 R. R. 468.

(*g*) *Bibb* v. *Thomas*, (1776) 2 W. Bl. 1043.

(*h*) *Doe* v. *Harris*, *supra*.

(*i*) *Doe* v. *Perkes*, (1820) 3 B. & Ald. 489; 22 R. R. 458.

(*k*) *Hobbs* v. *Knight*, (1838) 1 Curt. 768; *Evans* v. *Dallow*, (1862) 31 L. J. P. & M. 128. See *ante*, § 165.

(*l*) *Price* v. *Powell*, (1858) 3 H. & N. 341; 117 R. R. 719; *Avery* v. *Pixley*, (1808) 4 Mass. 462. See, also, *Williams* v. *Tyley*, (1858) 1 V. John. 530; *In re Harris*, (1864) 33 L. J. P. & M. 181; 3 Sw. & Tr. 485.

(*m*) *Clarke* v. *Scripps*, *supra*; *In re Woodward*, (1871) L. R. 2 P. & D. 206; 40 L. J. P. & M. 17; *In re Wheeler*, (1880) 49 L. J. P. 29.

(*n*) See *In re Brewster*, (1860) 29 L. J. P. & M. 69; *Cheese* v. *Lovejoy*, (1877) 46 L. J. P. 66; 2 P. D. 251.

except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will (*o*); but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration (*p*), or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end (*q*) or some other part of the will." The word "apparent" here used, does not mean what is capable of being made apparent by extrinsic evidence, but simply applies to what is apparent on the face of the instrument; and consequently, if a testator entirely obliterates any part of the will, *animo revocandi*, this must still operate as a revocation of that part, and no evidence *dehors* the will can be received in order to show how the defaced passage originally stood (*r*). So, where a testator had covered a bequest in his will by pasting a piece of paper over it, the Court declined to order the removal of the paper, but granted probate of the will with the covered part in blank (*s*). So, the erasure by the testator of his own signature, or of the signature of either or both of the witnesses, if done *animo revocandi*, would amount to a revocation of the whole will, and would in fact be tantamount to its actual destruction (*t*). It has already been shown while treating of the law of presumptions (*u*), that, in the absence of any direct evidence, the law will presume that any alteration or erasure in a will was made after its execution; and, consequently, the courts will grant a probate of the will in its original form (*v*).

§ 1070. It has further been determined, notwithstanding the language of section 34 (*x*), that the provisions of the Wills Act, with respect to the revocation or alteration of wills, apply equally to all wills, whether executed before or after January 1, 1838, provided the act of assumed revocation has been done, or the alteration has

(*o*) See *ante*, § 1050. See also, *In goods of Shearn*, (1880) 50 L. J. P. 15.

(*p*) *In re Wilkinson*, (1881) 6 P. D. 100.

(*q*) See *In re Treeby*, (1875) L. R. 3 P. & D. 242; 44 L. J. P. & M. 44, S. C.

(*r*) *Townley* v. *Watson*, (1844) 3 Curt. 761, 764, 768, 769; *In re M'Cabe*, (1873) L. R. 3 P. & D. 94; 42 L. J. P. & M. 79.

(*s*) *Re Horsford*, (1874) L. R. 3 P. & D. 211. As to what happened when some twenty years later it was discovered that the words which had been written beneath the paper had become visible to the ordinary eyesight of a careful observer, see *post*, § 1071; 44 L. J. P. & M. 79.

(*t*) *Hobbs* v. *Knight*, *supra*; *Evans* v. *Dallow*, *supra*. See, also, *In re Harris*, (1864) 33 L. J. P. & M. 181; 3 Sw. & Tr. 485.

(*u*) *Ante*, § 164.

(*v*) *Cooper* v. *Bockett*, (1846) 4 Moore P. C. 419; *Greville* v. *Tylee*, (1851) 7 Moore P. C. 320; 83 R. R. 57.

(*x*) See *ante*, § 1050.

been made, after that date (*y*). Although section 21, cited above (*z*), does not expressly state, that to effect a revocation of the will or any part of it, the erasure or obliteration must be made with that intention, yet the court has held that here, as under the Statute of Frauds, the *animus revocandi* is indispensable; and therefore, where a testator had erased the amount of a legacy, and had inserted a smaller sum, but the alteration took no effect, as it had not been duly executed, the court decreed probate of the will in its original form, since it was clear that the testator intended only a substitution, and not a revocation, of the bequests altered (*a*). What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, no sufficient reason exists for believing that he meant to vary the former gift at all (*b*), and the erasure is treated as an act done by mere mistake, *sine animo cancellandi* (*c*).

§ 1071. When this doctrine of dependent relative revocation becomes applicable, the court will have recourse to any means of legal proof by which to ascertain the disposition of the testator. Therefore, in the case already mentioned, in which a testator, to vary the amount of a legacy, had pasted a piece of paper over the sum bequeathed, on which he had written a substituted amount (which not being duly attested could not be taken as part of the will), the Court, when (though this was some years after probate of the rest of the will had been granted) it found that the original legacy could be read by the unassisted eyesight, gave effect to the will as originally framed, and admitted to probate the words which (*d*) had originally been omitted in the probate (*e*).

§ 1072. With respect to the revival of wills, the Wills Act enacts, that "no will or codicil, or any part thereof, which shall be in any

(*y*) *Hobbs* v. *Knight*, *supra*; *Countess de Zichy Ferraris* v. *M. of Hertford*, (1843) 3 Curt. 468; *Brooke* v. *Kent*, (1840) 3 Moore P. C. 334; 50 R. R. 59; *Croker* v. *M. of Hertford*, (1844) 4 Moore P. C. 339; *Andrews* v. *Turner*, (1842) 3 Q B. 177; 61 R. R. 194.

(*z*) *Ante*, § 1069.

(*a*) *Brooke* v. *Kent*, *supra*; *Burtenshaw* v. *Gilbert*, (1774) 1 Cowp. 52; *Onions* v. *Tyrer*, (1716) 1 P. Wms. 343; *In re Nelson*, (1872) I. R. 6 Eq. 569; *In re Cockayne*, (1856) Deane, Ecc. 177; *In re Parr*, (1860) 29 L. J. P. & M. 70; *In re Harris*, (1860) *id.* 79; 1 Sw. & Tr. 536; *In re Middleton*, (1865) 34 L. J. P. & M. 16; 3 Sw. & Tr. 583; *In re M'Cabe*, (1873) L. R. 3 P. & D. 94; 42 L. J. P. & M. 79.

(*b*) See *Rawlins* v. *Rickards*, (1860) 28 Beav. 370; 126 R. R. 175; *Ibbott* v *Bell*, (1865) 34 Beav. 395; 144 R. R. 573; *Quinn* v. *Butler*, (1868) 6 Eq. 225.

(*c*) *Locke* v. *James*, (1843) 11 M. & W. 901, 910, 911; 13 L. J. Ex. 186; 62 R. R. 822; per Parke, B. See *Tupper* v. *Tupper*, (1855) 1 K. & J. 665; 103 R. R. 311; and *ante*, § 1063, *ad fin.*

(*d*) See *ante*, § 1069.

(*e*) *Ffinch* v. *Combe*, [1894] P. 191; 63 L. J. P. 113.

manner revoked, shall be revived otherwise (*f*) than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same (*g*); and when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown" (*h*). By virtue of this enactment a conditional will, which has become invalid in consequence of the condition not having been performed, cannot now be established by any evidence of "adherence" (*i*); neither can the will of a married woman, once void as having been made without the consent of her husband, be subsequently set up by any parol recognition after the husband's death (*k*). Again, the destruction of the revoking instrument is no longer sufficient to revive a former will (*l*); and the question of revival or non-revival from this cause,—which under the old system was made to depend on the intention of the testator, as gathered from the circumstances of each particular case (*m*),—can never again arise.

§ 1073. The next important statute, to which it is necessary to refer, is the one generally known as Lord Tenterden's Act (*n*). The first section, which has already been set out and partially discussed in the Chapter *On Admissions* (*o*), provides generally,—when read in connexion with section 13 of the Mercantile Law Amendment Act (*p*), 1856,—that in actions grounded on simple contract, no case shall be taken out of the Statute of Limitations, except by *acknowledgment* or *promise* in *writing* to be *signed by the party chargeable thereby*, or by his authorised agent, or by part payment (*q*). Considering the endless variety of language in which acknowledgments

(*f*) See *ante*, § 165.

(*g*) See *In re Harper*, (1849) 7 Ecc. & Mar. Cas. 44; *Marsh* v. *Marsh*, (1861) 30 L. J. P. & M. 77; *Rogers* v. *Goodenough*, (1862) 2 Sw. & Tr. 342; 31 L. J. P. & M. 49; *In re Steele, May* v. *Wilson*, (1868) L. R. 1 P. & D. 575; 42 L. J. P. & M. 20; *In re Reynolds*, (1873) L. R. 3 P. & D. 35; 42 L. J. P. & M. 20.

(*h*) 7 W. 4 & 1 V. c. 26, s. 22. See *Andrews* v. *Turner*, *supra*.

(*i*) *Roberts* v. *Roberts*, (1862) 2 Sw. & Tr. 337; 31 L. J. P. M. 46.

(*k*) *Id.* 339, per Sir C. Cresswell. *Willock* v. *Noble*, (1875) L. R. 7 H. L. 580; 44 L. J. Ch. 345.

(*l*) *Major* v. *Williams*, (1843) 3 Curt. 432; *Brown* v. *Brown*, (1858) 8 E. & B. 876; 27 L. J. Q. B. 173; 112 R. R. 813; *In re Brown*, (1858) 1 Sw. & Tr. 32; *Wood* v. *Wood*, (1867) L. R. 1 P. & D. 309; 36 L. J. P. & M. 34.

(*m*) *James* v. *Cohen*, (1844) 3 Curt. 782, per Sir H. Fust, citing *Usticke* v. *Bawden*, (1824) 2 Add. 125.

(*n*) 9 G. 4, c. 14.

(*o*) *Ante*, § 744. See, also, § 600.

(*p*) 19 & 20 V. c. 97, s. 13, cited *ante*, § 745.

(*q*) The same law prevails in Ireland; 16 & 17 V. c. 113, s. 24, as amended by 19 & 20 V. c. 97, s. 13. See *Archer* v. *Leonard*, (1863) 15 Ir. Ch. R. 267; *Leland* v. *Murphy*, (1865) 16 *id.* 500.

of debts may be couched, it is obviously impossible to lay down distinct rules of interpretation, by following which the court (*r*) will be enabled to arrive at a sound decision in each particular case. Much must, under any circumstances, be left to discretion; yet still that discretion may be materially guided by attending to the following propositions, which appear to be warranted by the most trustworthy decisions.

§ 1074. First, the Legislature, in passing the Act, did not intend to alter the legal construction to be put upon acknowledgments or promises made by defendants, but merely required a different mode of proof; substituting the certain evidence of a writing signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses (*s*). The inquiry, therefore, whether in a given case the written document amounts to an acknowledgment or promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation (*t*). Secondly, in order to take a case out of the operation of the statute, the written and signed acknowledgment must amount either to an express promise to pay the debt, or to a clear and unqualified admission of a still subsisting liability, from which a promise to pay on request will be implied by law (*u*). The insertion, therefore, of a debt in the statement of assets and debts, made under the bankrupt law by a debtor whose affairs are in course of arrangement, will not be deemed a sufficient acknowledgment, as it simply amounts to an admission of a debt, which is to be paid in part or in some qualified mode (*v*). Thirdly, a conditional promise, in the absence of proof of the fulfilment of the condition, will not suffice; but if such proof be afforded, the promise, whether express or implied, will be converted into an

(*r*) That this is a question for the court, and not for the jury, see *ante*, § 43.

(*s*) See *Spollan* v. *Magan*, (1851) 1 Ir. C. L. R. 700.

(*t*) *Haydon* v. *Williams*, (1830) 7 Bing. 166; 6 L. J. (O.S.) C. P. 16; 33 R. R. 415.

(*u*) *Morrell* v. *Frith*, (1838) 3 M. & W. 405; 7 L. J. Ex. 172; 49 R. R. 659; *Bucket* v. *Church*, (1840) 9 C. & P. 212; 62 R. R. 746; *Tanner* v. *Smart*, (1827) 6 B. & C. 609; 5 L. J. (O.S.) K. B. 218; 30 R. R. 461; *Smith* v. *Thorne*, (1852) 21 L. J. Q. B. 199; 18 Q. B. 134; 88 R. R. 555; *Everett* v. *Robertson*, (1859) 28 L. J Q. B. 23; 1 E. & E. 16; 117 R. R. 120; *Francis* v. *Hawkesley*, (1859) 28 L. J. Q. B. 370; 1 E. & E. 1052; 117 R. R. 568; *Goate* v. *Goate*, (1856) 1 H. & N. 29; 108 R. R. 436; *Brigstocke* v. *Smith*, (1833) 1 Cr. & M. 486; 2 L. J. Ex. 187; 38 R. R. 676; *Hart* v. *Prendergast*, (1845) 14 M. & W. 741; 15 L. J. Ex. 223; 69 R. R. 806. In this case Alderson, B., questioned *Gardner* v. *M'Mahon*, (1842) 3 Q. B. 561; 11 L. J. Q. B. 297; 61 R. R. 314. In *Prance* v. *Sympson*, (1854) 1 Kay, 678; 101 R. R. 811, Wood, V.-C., held that the statute was ousted by a written acknowledgment that an account was pending coupled with a promise to pay the balance, if any should be found due from the writer. See *Hughes* v. *Paramore*, (1855) 24 L. J. Ch. 681; 7 De G. M. & G. 229; 109 R. R. 94; *Crawford* v. *Crawford*, (1867) I. R. 2 Eq. 166; *In re River Steamer Co., Mitchell's Claim*, (1871) L. R. 6 Ch. 822.

(*v*) See *Ex parte Topping*, (1865) 34 L. J. Bk. 44; 146 R. R. 451.

absolute one, and as such will support a statement of claim, averring a promise to pay on request (*x*). In the case of a conditional promise the statute begins to run, not from the date of the promise, but from the time when the condition is fulfilled (*y*).

§ 1075. Fourthly, since a mere acknowledgment of a debt, which does not amount in law to an implied promise to pay, will not take the case out of the Statute of Limitations, an admission to a stranger that a sum is due will not suffice (*z*); therefore an acknowledgment by the maker of a promissory note to the payee, of the existence of a debt due thereon, cannot be made available to defeat the Statute of Limitations by a subsequent holder of the note (*a*). Fifthly, a general written promise to pay, not specifying any amount, or an absolute admission of some debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence; but if no proof be given on this head, the plaintiff will be entitled merely to nominal damages (*b*). Sixthly, the promise or acknowledgment in writing need not specify either the person to whom, or the time when, it was made, but both these points may be established by parol evidence (*c*); nor need the whole terms of the promise appear

(*x*) *Humphreys* v. *Jones*, (1845) 14 M. & W. 1, 3; 14 L. J. Ex. 254; 69 R. R. 642; *Hart* v. *Prendergast*, *supra*.

(*y*) *Waters* v. *E. of Thanet*, (1842) 2 Q. B. 757; 11 L. J. Q. B. 87; 57 R. R. 784; *Maunsell* v. *Hedger*, (1851) 2 Ir. C. L. R. 88; *Hammond* v. *Smith*, (1864) 33 Beav. 452; 140 R. R. 216.

(*z*) *Stamford, &c., Bank* v. *Smith*, [1892] 1 Q. B. 765; 61 L. J. Q. B. 405; *In re Beavan*, [1912] 1 Ch. 196; 81 L. J. Ch. 113; *Lloyd* v. *Coote*, [1915] 1 K. B. 242; 84 L. J. K. B. 567; *Grenfell* v. *Girdlestone*, (1837) 2 Y. & C. Ex. 676; 7 L. J. Ex. Eq. 42; 47 R. R. 476; *Godwin* v. *Culley*, (1859) 4 H. & N. 378-380; 118 R. R. 502; *Fuller* v. *Redman*, (1859) 26 Beav. 614; 122 R. R. 268; *In re Hindmarsh*, (1860) 1 Dr. & Sm. 129; 127 R. R. 45; *Bush* v. *Martin*, (1863) 2 H. & C. 311; 33 L. J. Ex 17; 133 R. R. 690. See *post*, § 1091.

(*a*) *Stamford, &c., Bank* v. *Smith*, *supra*; *Cripps* v. *Davis*, (1843) 12 M. & W. 159; 13 L. J. Ex. 217; 67 R. R. 292; *Mountstephen* v. *Brooke*, (1819) 3 B. & A. 141; 22 R. R. 805. In *Bourdin* v. *Greenwood*, (1872) 41 L. J. Ch. 73; 13 Eq. 280, Wickens, V.-C., decided a curious point in connexion with this subject. The maker of a promissory note bearing date, Jan., 1846, was in 1866 pressed for payment, whereupon he took the note, altered the date by converting the 4 of 1846 into a 6, indorsed his name as follows: "W. H. Langley, 1866," and then returned the note to the holder. A creditor's suit being subsequently brought, the Vice-Chancellor held, that the indorsement was a sufficient acknowledgment to bar the stat., and that the note, notwithstanding the alteration of the date, was still a valid document. *Sed. qu.*

(*b*) *Spong* v. *Wright*, (1842) 9 M. & W. 633; 12 L. J. Ex. 144; 60 R. R. 846; *Lechmere* v. *Fletcher*, (1833) 1 Cr. & M. 623; 2 L. J. Ex. 219; 38 R. R. 688; *Cheslyn* v. *Dalby*, (1840) 4 Y. & C. 238; 10 L. J. Ex. Eq. 21; 47 R. R. 384; *Waller* v. *Lacy*, (1840) 1 Man. & G. 54, 71; 9 L. J. C. P. 217; 56 R. R. 291; *Dickinson* v. *Hatfield*, (1831) 1 M. & Rob. 141; *Bewley* v. *Power*, (1833) Hayes & Jon. 368; *Chickernell* v. *Hotham*, (1854) 1 Kay, 669; 101 R. R. 804. These cases overrule the dicta of the court in *Kennett* v. *Milbank*, (1831) 8 Bing. 38; 1 L. J. C. P. 8. See *Hartley* v. *Wharton*, (1840) 11 A. & E. 934; *post*, § 1091; and *ante*, § 1024.

(*c*) *Hartley* v. *Wharton*, (1840) 11 A. & E. 934; 9 L. J. Q. B. 209; 52 R. R. 547; *Edmunds* v. *Downes*, (1834) 2 Cr. & M. 459; 3 L. J. Ex. 98; 39 R. R. 813. See *Lobb* v. *Stanley*, (1844) 5 Q. B. 574; 13 L. J. Q. B. 117.

upon one document, but parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together so that they may constitute a sufficient acknowledgment (*d*). Seventhly, even an infant, by giving a written acknowledgment of a debt due for necessaries, will take the debt out of the statute (*e*). Eighthly, it matters not under this statute, any more than under the Statute of Frauds (*f*), to what part of the document the signature of the party making the acknowledgment is attached (*g*). Ninthly, the promise, acknowledgment, or part-payment, must be made before action brought, since they severally bar the statute, not, as was formerly supposed, upon the ground of their rebutting the presumption of payment, but because they amount to a new promise (*h*). Lastly, the promise proved, whether express or implied, must correspond with that laid in the statement of claim (*i*); and therefore, an acknowledgment made to or by an executor or administrator will not support a count laying the promise to or by the testator or intestate (*k*).

§ 1076. In accordance with the second and third rules stated above, letters, in substance as follows, have been held insufficient, as not amounting to unqualified acknowledgments. "I intend to pay A.'s claim if allowed time; if I am proceeded against, any exertion of mine will be rendered abortive" (*l*);—"I have been expecting to be able to give a satisfactory reply to your application respecting B.'s demand against me. I will call upon you to-morrow on the matter" (*m*);—"I will have nothing to do with your claim; you can make me a bankrupt, but I had rather go to gaol than pay you" (*n*);—"I owe the money, but I will never pay it (*o*);"—"I am sure my account was settled; but as you say it was not, I will pay you £10 a year if you like to accept that sum" (*p*);—"If in funds I would immediately pay the money, and take the bill of exchange

(*d*) *McGuffie* v. *Burleigh*, (1898) 78 L. T. 264.

(*e*) *Willins* v. *Smith*, (1854) 4 E. & B. 180; 24 L. J. Q. B. 62; 99 R R. 414. But see *post*, § 1084.

(*f*) *Ante*, § 1028.

(*g*) *Holmes* v. *Mackrell*, (1858) 3 C. B. (N.S.) 789; 111 R. R. 837.

(*h*) *Bateman* v. *Pinder*, (1842) 3 Q. B. 574; 11 L. J. Q. B. 281; 61 R. R. 319, overruling *Yea* v. *Fouraker*, (1760) 2 Burr. 1099.

(*i*) *Tanner* v. *Smart*, (1827) 6 B. & C. 608; 5 L. J. (O.S.) Q. B. 218; 30 R. R. 461; *Cripps* v. *Davis*, *supra*.

(*k*) *Sarell* v. *Wine*, (1803) 3 East, 409; *Browning* v. *Paris*, (1839) 5 M. & W. 120; 8 L. J. Ex. 222; *Tanner* v. *Smart*, *supra*.

(*l*) *Fearn* v. *Lewis*, (1830) 6 Bing. 349; 8 L. J. (O.S.) C. P. 95; 31 R. R. 434.

(*m*) *Morrell* v. *Frith*, (1838) 3 M. & W. 402; 7 L. J. Ex. 172; 49 R R. 659; *Hamilton* v. *Terry*, (1852) 11 C. B. 954; 21 L. J. C. P. 132; *Cawley* v. *Furnell*, (1852) 12 C. B. 291; 20 L. J. C. P. 197.

(*n*) *Linsell* v. *Bonsor*, (1835) 2 Bing. N. C. 241.

(*o*) *A'Court* v. *Cross*, (1825) 3 Bing. 329; 4 L. J. (O.S.) C. P. 79.

(*p*) *Buckmaster* v. *Russell*, (1861) 10 C. B. (N.S.) 745; 128 R. R. 908.

out of your hands" (*q*);—"I admit as executor your claim on the estate, and think it just, but I am compelled to refuse payment as the legatees object" (*r*);—"I will not fail to meet you on fair terms, and hope, within perhaps a week, to be able to pay you at all events a portion of the debt, when we shall settle about the liquidation of the balance" (*s*);—"I send you an account of some debts due to me; collect them, and pay yourself, and you and I shall then be clear" (*t*); —"Arrangements have been made to enable me to discharge your debt; funds have been appointed for that purpose, of which A. is trustee, and to him I refer you for further information" (*u*);— "Send me in any demand you have to make on me, and, *if just*, I shall not give you the trouble of going to law" (*v*);—"I will not pay your demand, for it is of more than six years standing" (*x*); —"I have sent you a note for the money I owe you," the note so sent being inadmissible in evidence for want of a proper stamp (*y*).

§ 1077. So, the following *conditional acknowledgments* have been deemed insufficient, in the absence of proof that the conditions had respectively been fulfilled:—"I cannot pay the debt now, but I will as soon as I can" (*z*);—"We are waiting a remittance from Liverpool against beef we want to sell; when it comes, we shall send you the amount of the bill" (*a*);—"I shall be most happy to pay you principal and interest as soon as convenient" (*b*).

§ 1078. On the other hand, cases have been taken out of the operation of the statute, when the letters, in substance, contained such expressions as the following:—"I can never be happy till I have paid you; your account is correct, and would that I were now

(*q*) *Richardson* v. *Barry*, (1860) 29 Beav. 22; 131 R. R. 450.

(*r*) *Briggs* v. *Wilson*, (1854) 5 De G. M. & G. 12, 21; 104 R. R. 7.

(*s*) *Hart* v. *Prendergast*, (1845) 14 M. & W. 741; 15 L. J. Ex. 223; 69 R. R. 806; *Smith* v. *Thorne*, (1852) 21 L. J. Q. B. 199; 18 Q. B. 134; 88 R. R. 555; *Rackham* v. *Marriott*, (1857) 2 H. & N. 196; 26 L. J. Ex. 315; 115 R. R. 486.

(*t*) *Routledge* v. *Ramsay*, (1838) 8 A. & E. 221; 7 L. J. Q. B. 156; 47 R. R. 568.

(*u*) *Whippy* v. *Hillary*, (1832) 3 B. & Ad. 399; 1 L. J. K. B. 178; 37 R. R. 450. This case overrules *Baillie* v. *Ld. Inchiquin*, (1796) 1 Esp. 435, as the court admitted in *Routledge* v. *Ramsay*, *supra*.

(*v*) *Spong* v. *Wright*, *supra*. See *Collinson* v. *Margesson*, (1858) 27 L. J. Ex. 305; *Cassidy* v. *Firman*, (1867) I. R. 1 C. L. 8.

(*x*) *Brigstocke* v. *Smith*, (1833) 1 Cr. & M. 483; 2 L. J. Ex. 187; 38 R. R. 676; *Coltman* v. *Marsh*, (1811) 3 Taunt. 380.

(*y*) *Parmiter* v. *Parmiter*, (1860) 3 De G. F. & J. 461; 30 L. J. Ch. 508; 130 R. R. 210.

(*z*) *Tanner* v. *Smart*, (1827) 6 B. & C. 603; 5 L. J. (O.S.) K. B. 218; 30 R. R. 461; *Haydon* v. *Williams*, (1830) 7 Bing. 167; 9 L. J. (O.S.) C. P. 16; 33 R. R. 415; *Ayton* v. *Bolt*, (1829) 4 Bing. 105; 5 L. J. C. P. 109; *Gould* v. *Shirley*, (1829) 2 Moo. & P. 581; 7 L. J. (O.S.) C. P. 117.

(*a*) *Hodgens* v. *Graham*, (1831) Alc. & Nap. 49.

(*b*) *Edmunds* v. *Downes*, (1834) 2 Cr. & M. 459; 3 L. J. Ex. 98; 39 R. R. 813; *Meyerhoff* v. *Froehlich*, (1878) 48 L. J. C. P. 43; 4 C. P. D. 63.

going to inclose the amount" (*c*);—"I wish I could comply with your request, for I am anxious to pay your bill. I hope that out of the present harvest it will be paid; if not, the concern must be broken up to meet it" (*d*);—"I am in your debt, and will not avail myself of the statute; but we do not agree as to the amount, and until this be ascertained, I cannot move a step towards giving you satisfaction, and doing justice to my other creditors" (*e*);—"I will pay you your debt by instalments, but I demur to pay the interest" (*f*);—"Your bill does not sufficiently specify the work done, and I shall feel obliged if you will more particularly explain it. I will settle your account immediately; but being at a distance, I want everything explicit. Tell H. to send me the agreements, and I will return them by the first post with instructions to pay, if correct" (*g*);—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands" (*h*);—"I shall be obliged to you to send in your account, and can give no further orders till this be done" (*i*);—"If you send me the particulars of your account with vouchers, I will examine it and send cheque. But the amount cannot be anything like the amount you now claim" (*k*);—"I am ashamed your account has stood so long; I must trespass on your kindness a little longer, till a turn in trade takes place" (*l*);—"Your demand is not just; I am not in your debt anything like £90; I will settle the difference when we meet" (*m*);—"I have received your letter" [which stated that some items in the bill sent with it were of more than six years' standing]; "P. will attend for me to tax your costs, and one will then know what to pay, the other what to

(*c*) *Dodson* v. *Mackey*, (1834) 8 A. & E. 225, n.; 47 R. R. 572, n.

(*d*) *Bird* v. *Gammon*, (1837) 3 Bing. N. C. 883; 6 L. J. C. P. 258; 43 R. R. 839; *Martin* v. *Geoghegan*, (1850) 13 Ir. L. R. 403.

(*e*) *Gardner* v. *M'Mahon*, (1842) 3 Q. B. 561; 11 L. J. Q. B. 297; 61 R. R. 314. This case was questioned by Alderson, B., in *Hart* v. *Prendergast*, *supra*. See *Leland* v. *Murphy*, (1865) 16 Ir. Ch. R. 500; *Crawford* v. *Crawford*, (1867) Ir. 2 Eq. 166; *Burrows* v. *Baker*, (1869) Ir. 3 Eq. 596; *Bewley* v. *Power*, (1833) Hayes & Jon. 368; and *Prance* v. *Sympson*, (1854) Kay, 678; 101 R. R. 811; cited *ante*, § 1074.

(*f*) *Shah Mukhun Lall* v. *Nawab Imtiazood Dowlah*, (1865) 10 Moore Ind. App. 362. See *Wilby* v. *Elgee*, (1875) L. R. 10 C. P. 497; 44 L. J. C. P. 254.

(*g*) *Sidwell* v. *Mason*, (1857) 2 H. & N. 306; 26 L. J. Ex. 407; 115 R. R. 552; *Godwin* v. *Culley*, (1859) 4 H. & N. 373; 118 R. R. 502.

(*h*) *Chasemore* v. *Turner*, (1875) L. R. 10 Q. B. 500; 45 L. J. Q. B. 66; but see *Green* v. *Humphreys*, (1884) 26 Ch. D. 474; 53 L. J. Ch. 625.

(*i*) *Quincey* v. *Sharpe*, (1876) 1 Ex. D. 72; 45 L. J. Ex. 347.

(*k*) *Skeet* v. *Lindsay*, (1877) 46 L. J. Ex. 249; 2 Ex. D. 314.

(*l*) *Cornforth* v. *Smithard*, (1859) 5 H. & N. 13; 29 L. J. Ex. 228; 120 R. R. 449; *Lee* v. *Wilmot*, (1866) L. R. 1 Ex. 364; 35 L. J. Ex. 175.

(*m*) *Colledge* v. *Horn*, (1825) 3 Bing. 119; 3 L. J. (O.S.) C. P. 184; 28 R. R. 606; *Edmonds* v. *Goater*, (1852) 15 Beav. 415; 21 L. J. Ch. 290; 92 R. R. 488.

receive" (*n*);—"I send you my account, leaving a blank for your counter-demand on me, and beg that you will favour me with the balance" (*o*);—"I will at any time pay my proportion of the joint debt" (*p*);—"I cannot comply with your request yet; the best way for you will be to send me the bill you hold, and draw another for £30, the balance of your money" (*q*); and letters disputing the amount but promising to pay what may in fact be due upon an account being taken (*r*).

§ 1079. In order to take a case out of the Statute of Limitations by a part-payment, it is not necessary that at the time of the payment the exact amount remaining due should be distinctly ascertained (*s*). Still, it must appear that the payment was made, not only on account of a debt, but on account of the debt for which the action is brought; and therefore, if there be two undisputed but entirely separate debts, a part-payment within six years, not specifically appropriated, will not, as it seems, bar the statute as to either (*t*). Moreover, it must appear that the payment was made in part discharge of the debt declared on; for the meaning of part-payment is not the naked fact of payment of a sum of money, but payment of a smaller on account of a greater sum, due from the person making the payment to him to whom it is made; which part-payment implies an admission of such greater sum being then due, and a promise to pay it (*u*). The circumstances, too, must be such as to warrant the jury in inferring a promise to pay the remainder; and therefore, if part-payment be accompanied by a positive refusal to pay any more, it will not take the case out of the statute, though the debtor admits that the remainder is due (*v*). The payment, also, of a dividend under the Bankruptcy law (*x*), or the payment of interest in pursuance of a

(*n*) *Murphy* v. *Meredith*, (1842) 5 Ir. L. R. 120. Held, that this was not a conditional acknowledgment, on which the plaintiff could only recover on proof of taxation of costs. See *Archer* v. *Leonard*, (1863) 15 Ir. Ch. R. 267.

(*o*) *Waller* v. *Lacy*, (1840) 1 Man. & G. 54; 9 L. J. C. P. 217; 56 R. R. 291; *Williams* v. *Griffith*, (1849) 3 Ex. 335; 18 L. J. Ex. 210; 77 R. R. 632.

(*p*) *Lechmere* v. *Fletcher*, (1833) 1 Cr. & M. 623; 2 L. J. Ex. 219; 38 R. R. 688.

(*q*) *Dabbs* v. *Humphries*, (1834) 10 Bing. 446; 3 L. J. C. P. 139.

(*r*) *Langrish* v. *Watts*, [1903] 1 K. B. 636; 72 L. J. K. B. 435. See, also, *Evans* v. *Simon*, (1853) 9 Ex. 282; 23 L. J. Ex. 16; 96 R. R. 714; *Collis* v. *Stack*, (1857) 1 H. & N. 605; 26 L. J. Ex. 138; 108 R. R. 746. The older authorities are not here referred to, as few of them are law. They are noticed in 2 St. Ev. 662-667.

(*s*) *Walker* v. *Butler*, (1856) 25 L. J. Q. B. 377; 6 E. & B. 506; 106 R. R. 691.

(*t*) *Burn* v. *Boulton*, (1846) 2 C. B. 476; 15 L. J. C. P. 97; 69 R. R. 508. But see *Walker* v. *Butler*, *supra*. See, also, *Nash* v. *Hodgson*, cited *post*, § 1081.

(*u*) *Tippets* v. *Heane*, (1834) 1 Cr. M. & R. 252; 3 L. J. Ex. 281; 40 R. R. 549; *Waters* v. *Tompkins*, (1835) 2 Cr. M. & R. 723; 5 L. J. Ex. 61; 41 R. R. 827; *Waugh* v. *Cope*, (1840) 6 M. & W. 824, 829; 10 L. J. Ex. 145; 55 R. R. 801. See *Worthington* v. *Grimsditch*, (1845) 7 Q. B. 479; 15 L. J. Q. B. 52; 68 R. R. 502.

(*v*) *Wainman* v. *Kynman*, (1847) 1 Ex. 118; 16 L. J. Ex. 232; 74 R. R. 612.

(*x*) *Ex parte Topping, In re Levey Robson*, (1865) 34 L. J. Bk. 44; 146 R. R. 451; *Davies* v. *Edwards*, (1851) 7 Ex. 22; 21 L. J. Ex. 4; 86 R. R. 560.

judgment obtained in a former action, to which the Statute of Limitations has been unsuccessfully pleaded (*y*), is open to the same objection. The reason why the effect of part-payment is left untouched by Lord Tenterden's Act appears to be, that it is an admission evidenced by an act, and, as such, not so liable to misinterpretation or mistake as a mere acknowledgment by words (*z*).

§ 1080. It has been urged that, on the same ground, the sale and delivery of goods, which, equally with the payment of money, are acts done, should be exempted from the operation of Lord Tenterden's Act; but the answer is that, however this may be in theory, the statute in fact contains no exception in favour of the sale or delivery of goods. These acts, therefore, are not sufficient to take a case out of the Statute of Limitations, unless done under circumstances which would render the delivery equivalent to payment (*a*); as, for instance, if the parties were expressly to agree that goods delivered by the one should be taken by the other in part payment of the debt (*b*). In such a case the statute would be barred, for the Legislature never intended that the "part-payment" should necessarily be in actual money, but it will suffice if it be made in any mode which the parties agree shall be treated as equivalent to a money payment (*c*).

§ 1081. Neither will the existence of items within six years in an open account operate to take the previous portion of the account out of the Statute of Limitations, but there must be an actual part-payment in cash, or something equivalent to it (*d*). Moreover, if in a continuous account some items have accrued before, and others within, the six years, the mere payment of a sum by the debtor, without any evidence of an appropriation on his part, or of an intention to apply such sum in part discharge of the earlier items, will not have the effect of exempting them from the operation of the Statute of Limitations; though, in such case, the creditor may, unless

(*y*) *Morgan* v. *Rowlands*, (1872) L. R. 7 Q. B. 493; 41 L. J. Q. B. 187.

(*z*) *Waters* v. *Tompkins*, *supra*; *Bodger* v. *Arch*, (1854) 10 Ex. 340; 24 L. J. Ex. 19; 102 R. R. 613.

(*a*) *Cottam* v. *Partridge*, (1842) 4 Man. & G. 271, 287-289, 291-293; 11 L. J. C. P. 161; overruling *Catlin* v. *Skouiding*, (1795) 6 T. R. 189, as only applicable to the state of the law previous to the passing of Ld. Tenterden's Act. See, also, *Williams* v. *Griffiths*, (1835) 2 Cr. M. & R. 46; 4 L. J. Ex. 129; 41 R. R. 685.

(*b*) *Hart* v. *Nash*, (1835) 2 Cr. M. & R. 337; 41 R. R. 732; *Hooper* v. *Stephens*, (1835) 4 A. & E. 71; 5 L. J. K. B. 4; 43 R. R. 306; *Blair* v. *Ormond*, (1851) 17 Q. B. 434; 20 L. J. Q. B. 444; 85 R. R. 529. See *Hughes* v. *Paramore*, (1855) 24 L. J. Ch. 681; 7 De G. M. & G. 229; 109 R. R. 94.

(*c*) *Bodger* v. *Arch*, *supra*; *Amos* v. *Smith*, (1867) 31 L. J. Ex. 423; 1 H. & C. 238; 130 R. R. 483; *Maber* v. *Maber*, (1867) L. R. 2 Ex. 153; 36 L. J. Ex. 70.

(*d*) *Cottam* v. *Partridge*, *supra*; *Williams* v. *Griffiths*, *supra*; *Mills* v. *Fowkes*, (1839) 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750; *Waller* v. *Lacey*, (1840) 1 Man. & G. 54, 75; 9 L. J. C. P. 217; 56 R. R. 291; *Williams* v. *Griffith*, (1849) 3 Ex. 335; 18 L. J. Ex. 210; 77 R. R. 632.

expressly prohibited by the debtor from doing so at the time when payment is made, at any time apply the payment to the debts that have been due for a longer period than six years (*e*). Where a party had been the maker of three promissory notes, two of which were barred by the statute, but the other was not barred, a payment made by him on account of interest generally was attributed exclusively to the note which was not barred (*f*). It has been held in one case, that the going through an account with items on both sides, and striking a balance, was an act equivalent to part-payment; the apparent ground of the decision being, that such a proceeding converted the *set-off* into *payments*, and raised a new consideration for the liquidation of the balance (*g*). The doctrine will not extend to a case where an account has been furnished merely by one party, even though it contain cross items, and fix the balance due (*h*). Neither will it apply where the account actually stated and settled by both parties contains items on one side only (*i*), for it will then be no more than a mere parol statement of, and promise to pay, an existing debt; and to hold such a statement of account to be sufficient, would be to repeal the statute (*k*).

§ 1082. Though the payment, in order to take the case out of the operation of the statute, may be either of principal or of interest, yet if the debt be made up of sums due on both these accounts, the payment of the principal will raise no implied promise to pay the interest, at least, if accompanied by a refusal to pay it (*l*), but the payment of interest barred by the statute, though it does not necessarily prove that the principal money is due, is some evidence of that fact (*m*); and if coupled with other circumstances, as, for instance, if the interest was due upon a note, which was allowed to remain in the hands of the payee, the payment of that interest might fairly be regarded as a sufficient acknowledgment of the currency of the note, to revive the claim for the principal (*n*). Where a bill is drawn in part-payment of a debt, it operates to defeat the statute from the time of

(*e*) *Mills* v. *Fowkes*, *supra*. See *Re Rainforth*, (1880) 49 L. J. Ch. 5.

(*f*) *Nash* v. *Hodgson*, (1856) 25 L. J. Ch. 186; 6 De G. M. & G. 474; 106 R. R. 157.

(*g*) *Ashby* v. *James*, (1843) 11 M. & W. 542; 12 L. J. Ex. 295; 63 R. R. 676.

(*h*) *Bristow* v. *Miller*, (1828) 11 Ir. L. Rep. 461, 472.

(*i*) *Ashby* v. *James*, *supra*, apparently overruling *Smith* v. *Forty*, (1829) 4 C. & P. 126; 34 R. R. 774.

(*k*) *Jones* v. *Ryder*, (1838) 4 M. & W. 32; 7 L. J. Ex. 216; 51 R. R. 452; *Reeves* v. *Hearne*, (1836) 1 M. & W. 323; 5 L. J. Ex. 156; *Hopkins* v. *Logan*, (1839) 5 M. & W. 248; 8 L. J. Ex. 218; 52 R. R. 704; *Clark* v. *Alexander*, (1844) 8 Scott, N. R. 147; 13 L. J. C. P. 133; 66 R. R. 844.

(*l*) *Collyer* v. *Willock*, (1827) 4 Bing. 313; 5 L. J. (O.S.) C. P. 181.

(*m*) *Purdon* v. *Purdon*, (1842) 10 M. & W. 562; 12 L. J. Ex. 3; 62 R. R. 704.

(*n*) *Bealy* v. *Greenslade*, (1831) 2 Cr. & J. 61; 1 L. J. Ex. 1; *Bamfield* v. *Tupper*, (1851) 7 Ex. 27; 21 L. J. Ex. 6; 86 R. R. 563; *Re Rutherford*, (1880) 14 Ch. D. 687; 49 L. J. Ch. 654.

its delivery to the creditor (*o*), and this, too, whether the bill be subsequently honoured or not; for the word "payment" in Lord Tenterden's Act must be taken to be used by the Legislature in a popular sense, and in a sense large enough to include not only payments in actual satisfaction, but also conditional payments.

§ 1083. With respect to the mode of proving the *fact* of payment, the courts for many years put a forced, though salutary, construction on Lord Tenterden's Act, and held that the fact could not be established by any admission of the debtor short of an acknowledgment in writing duly signed (*p*). This doctrine, however, was at length rejected by the Exchequer Chamber as untenable, and it is now settled law that a mere parol acknowledgment, either of part-payment of principal, or of payment of interest, within six years, will suffice to take the case out of the Statute of Limitations (*q*). It seems almost needless to add, that, when the fact of some payment having been made has once been proved, recourse can be had to the parol admissions of the debtor, whether made before, or after, or at the time of payment, for the purpose of showing on what account that payment was made (*r*). Though reasonable evidence must be given of the identity of the debt, on account of which payment was made, with that which forms the subject-matter of the action (*s*), the jury will be warranted in inferring such identity, in the absence of any proof of more debts than one being acknowledged to be due (*t*).

§ 1084. Under section 5 of Lord Tenterden's Act (*u*) "no action could be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification were made by some writing signed by the party to be charged therewith." As that provision was not considered sufficiently stringent to protect improvident

(*o*) *Turney* v. *Dodwell*, (1854) 3 E. & B. 136; 23 L. J. Q. B. 157; 97 R. R. 409; *Irving* v. *Veitch*, (1837) 3 M. & W. 90; 7 L. J. Ex. 25; 49 R. R. 511; *Gowan* v *Foster*, (1832) 3 B. & Ad. 507.

(*p*) *Bayley* v. *Ashton*, (1840) 12 A. & E. 493; 9 L. J. Q. B. 376; *Willis* v. *Newham*, (1830) 5 Y. & J. 518; *Maghee* v. *O'Neil*, (1841) 7 M. & W. 531; 10 L. J. Ex. 326; *Eastwood* v. *Saville*, (1842) 9 M. & W. 615; 11 L. J. Ex. 383.

(*q*) *Cleave* v. *Jones*, (1851) 6 Ex. 573; 20 L. J. Ex. 238; 86 R. R. 399. See, also, *Edwards* v. *Janes*, (1855) 1 K. & J. 534; 103 R. R. 225.

(*r*) *Waters* v. *Tompkins*, (1835) 2 Cr. M. & R. 723; 5 L. J. Ex. 61; 41 R. R. 827; *Bevan* v. *Gething*, (1842) 3 Q. B. 740; 12 L. J. Q. B. 37; 61 R. R. 382; *Edan* v. *Dudfield*, (1841) 1 Q. B. 307; 55 R. R. 256. See *Baildon* v. *Walton*, (1847) 1 Ex. 617; 17 L. J. Ex. 357; 74 R. R. 782.

(*s*) *Waters* v. *Tompkins*, *supra*.

(*t*) *Evans* v. *Davies*, (1836) 4 A. & E. 840; 6 L. J. K. B. 268; *Burn* v. *Boulton*, (1846) 2 C. B. 476; 15 L. J. C. P. 97; 69 R. R. 508. As to the law, where payment is made by one of several joint debtors, see *ante*, §§ 744-746

(*u*) 9 G. 4, c. 14, s. 5, repealed by 38 & 39 V. c. 66.

young men from designing sharpers, the Legislature again interposed in 1874, and passed an enactment which absolutely prohibits the bringing of any action "upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age" (*v*). These words will include any ratification made after the 7th of August, 1874 (*x*), even though it relate to a contract made before that date (*y*); they will extend to the ratification of a promise to marry (*z*); and they will also be held applicable to any set-off or counterclaim, although, in strict interpretation, the language of the Act would seem *prima facie* to be confined to actions brought (*a*).

§ 1085. Section 6 of Lord Tenterden's Act enacts, that "no action shall be brought, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*b*), unless such representation or assurance be made in writing, signed by the party to be charged therewith" (*c*). This provision—which is now in substance extended to Scotland by the Act of 19 & 20 Vict. c. 60, s. 6—was rendered necessary by the case of *Pasley* v. *Freeman* (*d*), which afforded ample opportunity for evading the enactment of the Statute of Frauds, that required guarantees to be in writing (*e*), by enabling the plaintiff to shape his demand, not upon a special promise to answer for the debt or default of another, but upon a tort or wrong done to him, by some false or fraudulent representation made by the defendant, in order to induce him to contract with another person. The statute applies only to fraudulent representations, and accordingly cannot be relied upon

(*v*) 37 & 38 V. c. 62, s. 2.

(*x*) See *Smith* v. *King*, [1892] 2 Q. B. 543.

(*y*) *Ex parte Kibble, Re Onslow*, (1875) L. R. 10 Ch. 373; 44 L. J. Bank. 63.

(*z*) *Coxhead* v. *Mullis*, (1878) 3 C. P. D. 439; 47 L. J. C. P. 761. But see *Northcote* v. *Doughty*, (1879) 4 C. P. D. 385; and *Ditcham* v. *Worrall*, (1880) 5 C. P. D. 410; 49 L. J. C. P. 688, in which the fixing of the wedding-day by the parties was regarded by the court as tantamount to a fresh promise.

(*a*) *Rawley* v. *Rawley*, (1876) 1 Q. B. D. 460; 45 L. J. Q. B. 675.

(*b*) The word "upon" is obviously a misprint.

(*c*) See *Swift* v. *Jewesbury*, (1874) L. R. 9 Q. B. 301; 43 L. J. Q. B. 56, where it was held that the signature of a manager of a banking company was not the signature of the bank within the meaning of this Act, overruling *Swift* v. *Winterbotham*, (1873) L. R. 8 Q. B. 244; 42 L. J. Q. B. 111. As to the word "person" in section 6 including a corporation, see per Lords Parker, of Waddington, and Wrenbury in *Banbury* v. *Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158.

(*d*) (1789) 3 T. R. 51; 1 R. R. 634.

(*e*) *Ante*, §§ 1019, 1030—1034.

as a defence to an action founded upon breach of duty arising *ex contractu* or *quasi ex contractu* (*f*).

§ 1086. The meaning of the word "ability," mentioned in the section, has been the subject of more than one lengthened discussion in the courts of law. In *Lyde* v. *Barnard* (*g*), an action was brought against the trustees of Lord Edward Thynne, for falsely representing that Lord Edward's life-interest in certain trust property was charged with only three annuities, whereby the plaintiff was induced to purchase an annuity from Lord Edward, secured by his bond, &c., and by an assignment of his interest in the trust fund; whereas the defendant well knew that the said interest was also charged with a mortgage of £20,000. It appearing at the trial that the representations were by parol, the judges of the Court of Exchequer were equally divided on the question, whether they related to the ability of Lord Edward; Barons Parke and Alderson contending that they simply had reference to the state of the fund; but Lord Abinger and Baron Gurney, with apparently more reason, holding that they related to the state of the fund, as an element only of Lord Edward's personal credit, and that substantially the question which they purported to answer regarded his ability to give security of adequate value. This last opinion is somewhat confirmed by a subsequent decision of the Court of Queen's Bench (*h*). There, a false representation by a solicitor, that his client might be safely trusted, because he had lately purchased an estate, and the title-deeds were in his (the solicitor's) possession, so that the client could do nothing without his knowledge, was held by the judges to be a representation respecting the ability of the client, which, consequently, required to be in writing.

§ 1087. In order to come within the meaning of the Act, it is not necessary that the action should be brought directly upon the representation; but where a plaintiff sought, in an action for money had and received, to recover the value of goods which he had supplied to a third party on the defendant's representation, and which had been sold by such third party, and the proceeds paid to the defendant, the court held that, as the plaintiff's case rested on the misrepresentation alone, it directly fell within the terms of the Act (*i*). Perhaps had the misrepresentation formed only one link in the chain of fraud, by which the plaintiff had been deprived of his goods, the result might have been different (*k*). The Act also applies to a misrepresentation made by one

(*f*) *Banbury* v. *Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158.
(*g*) (1836) 1 M. & W. 101; 5 L. J. Ex. 117; 46 R. R. 269.
(*h*) *Swann* v. *Phillips*, (1838) 8 A. & E. 457; 7 L. J. Q. B. 200; 47 R. R. 626.
(*i*) *Haslock* v. *Fergusson*, (1837) 7 A. & E. 86; 6 L. J. K. B. 247.
(*k*) *Id.*

partner respecting the credit of the firm (*l*). When several false representations respecting a man's character have been made by different persons, or when the same person has made one representation in writing and another in conversation, the action will be maintainable, if the jury are of opinion that the plaintiff was mainly or even partially induced by the writing declared on to give the credit which occasioned the loss (*m*).

§ 1088. To take a case out of the Real Property Limitation Acts of 1833 (*n*), or 1874 (*o*), the several acknowledgments mentioned therein must all be in writing and duly signed. Thus, under section 14 of the first Act, "an acknowledgment of the title of the person entitled to any land, or rent," must, in order to neutralize the effect of his discontinuance of the possession, or of the receipt of the profits, or of rent, be "given to him or his agent in writing, signed by the person in possession, or in the receipt of the profits of such land, or in receipt of such rent." So, under section 7 (*p*) of the last Act, "an acknowledgment in writing of the title of the mortgagor, or of his right of redemption," must, in order to keep alive his rights, in the event of the mortgagee obtaining the possession or receipt of the profits of any land, or the receipt of any rent, be "given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor, or person, signed by the mortgagee, or the person claiming through him" (*q*). Section 8 (*r*) of the last Act also enacts, that "no action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land (*s*) or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person, capable of giving a discharge for, or release of, the same; unless, in the meantime (*t*), some part of the principal money, or some interest thereon, shall have been paid, or

(*l*) *Devaux* v. *Steinkeller*, (1839) 6 Bing. N. C. 84; 9 L. J. C. P. 30; 54 R. R. 734.

(*m*) *Wade* v. *Tatton*, (1856) 25 L. J. C. P. 240.

(*n*) 3 & 4 W. 4, c. 27; extended to Ireland by 6 & 7 V. c. 54, and 7 & 8 V. c. 27. See *ante*, § 74, and note.

(*o*) 37 & 38 V. c. 57. See *ante*, § 74, n.

(*p*) Set out verbatim, *ante*, § 747, n.

(*q*) As to what is a sufficient acknowledgment to satisfy these words, see *Stansfield* v. *Hobson*, (1852) 3 De G. M. & G. 620; 22 L. J. Ch. 657; 98 R. R. 201; *Trulock* v. *Robey*, (1841) 12 Sim. 402; 56 R. R. 87; *Thompson* v. *Bowyer*, (1863) 2 New R. 504.

(*r*) This section has been substituted for s. 40 of 3 & 4 W. 4, c. 27, which section was repealed by s. 9 of 37 & 38 V. c. 57.

(*s*) Money due on a bond executed by an ancestor is not a sum "charged upon, or payable out of, any land," within the meaning of this section; *Roddam* v. *Morley*, (1857) 1 De G. & J. 1; 26 L. J. Ch. 438; 118 R. R. 1; *Morley* v. *Morley*, (1856) 25 L. J. Ch. 1; 6 De G. M. & G. 610.

(*t*) As to the meaning of these words, see *Harty* v. *Davis*, (1850) 13 Ir. L. R. 23.

some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable (*u*), or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought, but within twelve (*v*) years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given " (*x*).

§ 1089. No acknowledgment of any title mentioned in these Acts will be operative to restore such title after it has once been extinguished by the effluxion of time (*y*). The acknowledgments, also, must be distinct and unconditional; and, therefore, where a party in adverse possession of land, on being applied to by the person claiming title to it, to pay rent and take a lease, wrote in answer:—" Although, if matters were contested, I think I could establish a legal right to the premises, yet, under all the circumstances, I will accede to your proposal of my paying a moderate rent, on an agreement for a term of twenty-one years; "—it was held, that, as this arrangement was never carried into effect, the letter written with a view to it could not be regarded as an acknowledgment of title, within the meaning of section 14 of the Act of 1833 (*z*). Where an acknowledgment of title is distinct, no objection can be taken to it on the ground that it was obtained by compulsion and given upon oath. An answer, therefore, to a bill in Chancery under the old forms of pleading will, if it acknowledges the plaintiff's title, be sufficient to satisfy the statute (*a*).

§ 1090. Again, the Act passed in 1833 for the Amendment of the Law (*b*),—after enacting that all actions of debt for rent upon an indenture of demise, or of covenant or debt upon any bond or other specialty, or of debt or scire facias upon recognizance, must be brought within twenty years after the cause of such actions or suits (*c*),—provides, that " if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty,

(*u*) As to the meaning of these words, see and compare *Toft* v. *Stephenson*, (1851) 1 De G. M. & G. 28, 40; 21 L. J. Ch. 129; 91 R. R. 14; *Pears* v. *Laing*, (1871) L. R. 12 Eq. 41; 40 L. J. Ch. 225; *Bolding* v. *Lane*, (1863) 1 De G. J. & S. 122; 32 L. J. Ch. 219; 137 R. R. 174; and *In re Fitzmaurice*, (1864) 15 Ir. Eq. R. 445.

(*v*) See *Sutton* v. *Sutton*, (1882) 22 Ch. D. 511; 52 L. J. Ch. 333; *Fearnside* v. *Flint*, (1882) 22 Ch. D. 579; 52 L. J. Ch. 479.

(*x*) See 23 & 24 V. c. 38, s. 13, as to claims to the estates of persons dying intestate; also, *Reed* v. *Fenn*, (1866) 35 L. J. Ch. 464.

(*y*) *Sanders* v. *Sanders*, (1882) 19 Ch. D. 373; 51 L. J. Ch. 276.

(*z*) *Doe* v. *Edmonds*, (1840) 6 M. & W. 295; 55 R. R. 615. See *Doe* v. *Beckett*, (1843) 4 Q. B. 601; 12 L. J. Q. B. 236; 62 R. R. 441; and cases cited in the last five notes.

(*a*) *Goode* v. *Job*, (1858) 28 L. J. Q. B. 1; 1 E. & E. 6; 117 R. R. 113.

(*b*) 3 & 4 W. 4, c. 42.

(*c*) S. 3, set out, *ante*, § 75*b*, note. The Irish Act, 16 & 17 V. c. 113, contains a somewhat similar provision, in s. 20.

or recognizance, or his agent, or by part-payment (*d*) or part-satisfaction, on account of any principal or interest being then due thereon," the plaintiff may bring his action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment (*e*).

§ 1091. With respect to acknowledgments by signed writings under this Act, it seems to be clear, that the amount need not be specified in them any more than in acknowledgments under Lord Tenterden's Act; but if anything be due, the amount may be proved by parol evidence (*f*). The acknowledgment need not amount to a promise to pay (*g*), though it must contain an admission of an actually existing debt, and if it merely shows that a debt was due at some prior time, it will not suffice (*h*). Unlike the law which governs the admissions of simple contract debts (*i*), an acknowledgment made to a third party will satisfy this Act (*k*); and where a mortgagor, in assigning his equity of redemption, had recited that all interest was paid upon the mortgage, the court held, in an action brought by the mortgagee against the mortgagor on the original mortgage deed, within twenty years from the date of the assignment, that such recital was ample evidence of an acknowledgment by part-payment of interest, so as to take the case out of the statute (*l*). The assignee, too, in this case, having in pursuance of a covenant contained in the deed of assignment paid the future interest to the mortgagee, such payment was considered by the judges to be a sufficient acknowledgment as against the mortgagor (*m*).

§ 1092. By the *Prescription Acts*, claims to rights of common and other profits *à prendre* (*n*), to rights of way or other easements, to the use of light, to the payment of a modus, or to exemption from tithes, are rendered indefeasible after the lapse of certain defined periods (*o*),

(*d*) See *Ashlin* v. *Lee*, (1875) 44 L. J. Ch. 376.

(*e*) S. 5; and 16 & 17 V. c. 113, s. 23, Ir.

(*f*) *Howcutt* v. *Bonser*, (1849) 3 Ex. 496; 18 L. J. Ex. 262; 77 R. R. 702, per Parke, B.; see *ante*, § 1075.

(*g*) *Moodie* v. *Bannister*, (1859) 4 Drew, 432; 28 L. J. Ch. 881; 113 R. R. 406. See *ante*, § 1075.

(*h*) *Howcutt* v. *Bonser*, *supra*.

(*i*) See *ante*, § 1075.

(*k*) *Moodie* v. *Bannister*, *supra*, resolving a point left undecided in *Howcutt* v. *Bonser*, *supra*. See *Wilby* v. *Elgee*, (1875) L. R. 10 C. P. 497; 44 L. J. C. P. 254.

(*l*) *Forsyth* v. *Bristowe*, (1853) 8 Ex. 716; 22 L. J. Ex. 255; 91 R. R. 724.

(*m*) *Id.*

(*n*) The Act does not apply to profits *à prendre* in gross. *Shuttleworth* v. *Le Fleming*, (1865) 19 C. B. (N.S.) 687; 34 L. J. C. P. 309; 147 R. R. 721; or to rights claimed by a copyholder in his own tenement according to the custom of the manor, *Hanmer* v. *Chance*, (1865) 4 De G. J. & S. 626; 34 L. J. Ch. 413; 146 R. R. 488.

(*o*) If a payment of an annual sum has been made in respect of the user, the inference is that the enjoyment has not been *as of right*: *Gardner* v. *Hodgson's Kingston Brewery Co.*, [1903] A. C. 229; 72 L. J. Ch. 558.

unless it shall appear that the respective privileges were enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing" (*p*).

§ 1093. A proviso is contained in section 7 of the Railway and Canal Traffic Act of 1854 (*q*), to the effect that no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable, and be signed by such party, or by the person delivering such things for carriage (*r*).

§ 1094. Under the Bills of Exchange Act, 1882, an acceptance of a bill is invalid, unless, among other conditions, "it be written on the bill and be signed by the drawee"; but "the mere signature of the drawee without additional words is sufficient" (*s*).

§ 1095. By the Truck Acts, 1831 to 1896 (*t*), no stoppage or deduction shall in any case be made from the wages of any artificer protected by those statutes, unless the agreement "for such stoppage or deduction shall be in writing, and signed by such artificer" (*u*).

§ 1096. Chattels of under-tenants, lodgers, and other persons, not being tenants of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof, are, with certain exceptions, and subject to certain qualifications and restrictions, privileged from being distrained for rent owing to the superior landlord of demised premises by his immediate tenant by the Law of Distress Amendment Act, 1908 (*v*). In order to entitle the privileged person to the protection of the Act, such person must,

(*p*) 2 & 3 W. 4, c. 71, extended to Ireland by 21 & 22 V. c. 42; 2 & 3 W. 4, c. 100, s. 1. Vide *ante*, § 75.

(*q*) 17 & 18 V. c. 31; *Gregory* v. *W. Midland Ry.*, (1864) 33 L. J. Ex. 155.

(*r*) See *Wise* v. *Gt. Western Ry.*, (1856) 25 L. J. Ex. 258; 1 H. & N. 63; 108 R. R. 456; *Simons* v. *Gt. Western Ry.*, (1857) 2 C. B. (N.S.) 620; 109 R. R. 806; *Lond. & N. Western Ry.* v. *Durham*, (1856) 18 C. B. 826; 107 R. R. 531; *Pardington* v. *S. Wales Ry.*, (1856) 1 H. & N. 392; 26 L. J. Ex. 105; 108 R. R. 643; *Peek* v. *N. Staffordshire Ry.*, (1863) 10 H. L. C. 473; 138 R. R. 250; 32 L. J. Q. B. 241; *M'Manus* v. *Lancs. & Yorkshire Ry.*, (1859) 4 H. & N. 327; 118 R. R. 470; *Lewis* v. *Gt. Western Ry.*, (1860) 5 H. & N. 867; 29 L. J. Ex. 425; 120 R. R. 857; same name, but different case (1877) 3 Q. B. D. 195; *Beal* v. *S. Devon Ry.*, (1864) 3 H. & C. 337; 140 R. R. 478; *Lloyd* v. *Waterford & Limerick Ry.*, (1862) 15 Ir. C. L. R. 37.

(*s*) 45 & 46 V. c. 61, s. 17.

(*t*) 1 & 2 W. 4, c. 37; 50 & 51 V. c. 46; 59 & 60 V. c. 44.

(*u*) 1 & 2 W. 4, c. 37, ss. 23, 24. See *Cutts* v. *Ward*, (1867) L. R. 2 Q. B. 357; 36 L. J. Q. B. 161; *Pillar* v. *Llynvi Coal Co.*, (1869) L. R. 4 C. P. 752; 38 L. J. C. P. 294.

(*v*) 8 Ed. 7, c. 53.

after the distress has been levied, or authorised, or threatened (*x*), serve the superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such privileged person, setting forth that such immediate tenant has no right or property, or beneficial interest in the chattels so distrained, or threatened to be distrained upon, and that such chattels are the property or in the lawful possession of such privileged person, and are not goods or live stock to which the Act is expressed not to apply; and also, in the case of an under-tenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration must be annexed a correct inventory, subscribed by the privileged person of the chattels referred to in the declaration.

By section 6 of the same Act, where the rent of the immediate tenant is in arrear, the superior landlord is empowered to serve upon any under-tenant or lodger a written notice (by registered post addressed to such under-tenant or lodger upon the premises), stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under-tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent.

§ 1097. Under the Solicitors' Remuneration Act, 1881, power is granted to any solicitor and his client to contract by an agreement "in writing, signed by the person to be bound thereby or by his agent in that behalf," respecting the form and amount of remuneration to be paid for professional services rendered in conveyancing or other non-contentious business out of court (*y*). The agreement need only be signed by the party to be charged (*z*). The agreement may be impeached upon the like grounds as an agreement not relating to the remuneration of a solicitor; and upon a taxation, if a client objects to the agreement as unfair and unreasonable, the taxing master may inquire into the facts and certify the same to the Court (*a*). Again, under the Attorneys and Solicitors Act, 1870, a solicitor may make

(*x*) *Thwaites* v. *Wilding*, (1883) 12 Q. B. D. 4; 53 L. J. Q. B. 1; decided upon the Lodgers' Goods Protection Act, 1871 (34 & 35 V. c. 79).

(*y*) 44 & 45 V. c. 44, s. 8.

(*z*) *Re Frape*, [1893] 2 Ch. 284; 62 L. J. Ch. 473; *Re Haslam*, [1902] 1 Ch. 769; 71 L. J. Ch. 374.

(*a*) S. 8 (4) of the Act.

a special agreement with his client "respecting the amount and manner of payment" for his services, whether past or future, provided such agreement be in writing, and further that it be pronounced, either by the taxing master or by the Court, to be fair and reasonable (*b*). Such an agreement cannot, indeed, be enforced by action (*c*), but the remuneration agreed upon may, if the terms be fair and reasonable, be recovered in a summary way. It is not necessary that the agreement should be signed by both parties (as was once supposed to be necessary (*d*)). It is sufficient if it be signed by the party sought to be bound thereby (*e*). An undertaking by a solicitor to "charge nothing if he lost the action," does not fall within these provisions, and need not be in writing (*f*).

§ 1098. The Merchant Shipping Act, 1894, among other protections which it affords to merchant seamen, enacts, that the master of every ship, except ships of less than eighty tons exclusively employed in the coasting trade, shall enter into an agreement with every seaman whom he carries to sea from any port of the United Kingdom as one of his crew, which agreement must be in a form sanctioned by the Board of Trade,—must be dated at the time of the first signature being attached to it,—must contain a variety of particulars specified in the Act,—and must be signed first by the master and afterwards by the seaman; and the signature of the seaman must be duly attested in the case of a foreign-going ship by a shipping-master, and in the case of a home-trade ship, either by a shipping-master or by some other witness; and in either event, before the seaman executes the instrument, it must be read over and explained to him, or, at least, the witness must ascertain that he understands its meaning (*g*). The same statute also enacts, in section 107, that "every indenture of apprenticeship to the sea service made in the United Kingdom by a board of guardians, or persons having the authority of a board of guardians shall be executed by the boy and the person to whom he is bound in the presence of, and shall be attested by, two justices of the peace, and these justices shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is

(*b*) 33 & 34 V. c. 28.

(*c*) S. 8 of the Act.

(*d*) *In re Lewis, Ex parte Munro*, (1876) 1 Q. B. D. 724; 45 L. J. Q. B. 816.

(*e*) *Re Thompson*, [1894] 1 Q. B. 462; 63 L. J. Q. B. 187; *Bake* v. *French*, [1907] 2 Ch. 215; 76 L. J. Ch. 605.

(*f*) *Jennings* v. *Johnson*, (1873) L. R. 8 C. P. 425; *Clare* v. *Joseph*, [1907] 2 K. B. 369; 76 L. J. K. B. 724.

(*g*) 57 & 58 V. c. 60, ss. 113—116. As to how the agreement is to be attested if the seaman is engaged in a Colonial or foreign part, see s. 124. As to what attestation is necessary when the agreement is altered by the consent of all parties, see s. 122. As to how releases between master and seaman are to be attested and proved, see s. 138. As to agreements with sea fishermen and apprenticeships to the sea fishing service, see ss. 392 *et seq.*

of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose."

§ 1099. The Pawnbrokers Act, 1872 (*h*), which empowers pawnbrokers to make special contracts with pawners in respect of pledges for loans above 40s., provides, in section 24, that, in every such case, the pawnbroker shall deliver a special contract pawnticket signed by himself to the pawner, and that the pawner shall sign a duplicate of such ticket (*i*).

§ 1099A. Under the Acts for regulating Hackney and Stage Carriages within the Metropolitan Police Districts of London and Dublin, no proprietor of such carriages can enforce the payment of any sum, claimed from any driver or conductor on account of his earnings, unless under an agreement in writing, which shall have been signed by such driver or conductor in the presence of a competent witness (*k*).

§ 1100. An order for the reception of a lunatic will be only valid if duly made in writing on one of the forms given in the schedule to the Lunacy Act, 1890 (*l*).

§ 1101. The Bankruptcy Act (*m*) and Rules contain some regulations respecting the appointment of proxies to act for creditors, and the form of voting letters, which deserve special notice. And first, a general proxy must be either the Official Receiver, or the manager, or clerk, or other person in the regular employ of the creditor (*n*); though a special proxy may be any one whom the creditor thinks fit to name (*o*). In either case the appointment will not be valid, unless it be in writing, signed by the creditor and attested by a witness (*p*). The instrument must also be in the prescribed form (*q*), and all blanks must be filled up in the handwriting of the creditor, or of his manager, or clerk, or other person in his regular employment, or of any commissioner to administer oaths (*r*). The agent of a corporation may fill up blanks, and sign for his principals, but he must expressly state that he is "duly authorised under the seal of the company" (*s*). Voting letters, which are now available by creditors who have proved

(*h*) 35 & 36 V. c. 93.
(*i*) These tickets and duplicates are exempt from Stamp Duty, s. 24 of the Act.
(*k*) 6 & 7 V. c. 86, s. 23; 16 & 17 V. c. 112, s. 36, Ir. Under the London Act the agreement requires no stamp : s. 23.
(*l*) 53 V. c. 5.
(*m*) 4 & 5 G. 5, c. 59.
(*n*) Sched. 1, rr. 18, 22.
(*o*) Sched. 1, r. 19.
(*p*) Sched. 1, r. 16, forms 64, 65.
(*q*) Sched. 1 of Act, r. 16.
(*r*) Sched. 1, r. 16.
(*s*) Forms 64, 65.

their debts, for the purpose of assenting to, or dissenting from, a debtor's or a bankrupt's proposal for a composition or a scheme of arrangement, must be in the prescribed form, and be counter-signed by a witness (*t*).

§ 1101A. Under the Landlord and Tenant, Ireland, Act, 1870, every notice to quit to be served on a tenant of a holding, must be in writing or print, bearing a half-crown stamp, "and signed by the landlord or his agent lawfully authorised thereunto" (*u*).

§ 1102. It is required (*v*) that all notices of appeal to any court of general or quarter sessions, other than those against summary convictions, orders of removal, orders under any statute relating to pauper lunatics, orders in bastardy, or any proceedings by virtue of any Act relating to the revenue (all of which are specially provided for by various statutes), must specify in writing the particular grounds of appeal, and be signed by the person giving the same, or his solicitor on his behalf.

§ 1103. Under the Poor-law Amendment Acts, no pauper can be removed from one parish to another, unless by written consent, until twenty-one days after notice of chargeability in writing, accompanied by a copy or counterpart of the order of removal, and by a statement of the grounds of removal under the hands of the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, shall have been sent by them through the post or otherwise to the overseers of the parish to whom such order shall be directed (*x*); and no appeal can be heard against such order, unless the overseers or guardians of the appellant parish, or any three or more of such guardians, shall, with a notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, have sent or delivered to the overseers of the respondent parish a statement in writing under their hands of the grounds of appeal (*y*). The notice of appeal, as also the statement of grounds of appeal, may be transmitted through the post (*z*); and the fourteen days will be calculated from the time when, according to the usual course of post, the notice ought to reach the respondents (*a*).

(*t*) S. 16 (4); Form 81.

(*u*) 33 & 34 V. c. 46, s. 58, Ir.

(*v*) 12 & 13 V. c. 45, ss. 1 & 2. In *R.* v. *Kent, J.J.*, (1873) L. R. 8 Q. B. 305; 42 L. J. M. C. 112, the Court held that the statute was complied with though the notice of appeal was signed only by the *clerk* of the appellants' attorney. *Sed qu.*

(*x*) 4 & 5 W. 4, c. 76, s. 79; 11 & 12 V. c. 31, ss. 2, 9.

(*y*) 4 & 5 W. 4, c. 76, s. 81.

(*z*) 14 & 15 V. c. 105, s. 10.

(*a*) *R.* v. *Slawstone*, (1852) 18 Q. B. 388; 21 L. J. M. C. 145.

§ 1104. In construing these provisions, the Court of Queen's Bench has held that, although notices of appeal may be signed by the solicitor on behalf of the appellant parish (*b*), notices of chargeability, and statements of grounds of removal and of appeal, must respectively bear the signatures of the overseers or guardians (*c*). They will, however, be valid if signed by a majority of the aggregate body of the overseers and churchwardens (*d*); though they must be signed by at least such a majority (*e*). Still, it is not necessary that the document should show on its face that it proceeds from a majority of the parish officers (*f*), but it is certainly very desirable that this fact should appear (*g*). The guardians mentioned in these clauses are not guardians of a union, but are guardians expressly appointed to act for particular parishes under section 39 of 4 & 5 W. 4, c. 76 (*h*). As a parish is generally bound by the acts of those persons whom it represents to be its officers, the adverse parish, on a principle of reciprocity, is precluded from disproving the legality of the appointments of such officers, unless the notice signed by them be invalid on its face (*i*).

§ 1105. The Metropolis Local Management Act (*k*) enacts, in section 222, that "every notice, demand, or like document given by or on behalf of the Metropolitan Board of Works, or any vestry or district Board under that Act, may be in writing or print, or partly in writing and partly in print, and shall be sufficiently authenticated if signed by their clerk, or by the officer by whom the same is given" (*l*).

§ 1105A. It is enacted in section 117 of the Companies (Consolidation) Act, 1908 (*m*), that "any document or proceeding requiring authentication by a company, may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal."

§ 1105B. Similar provisions may be found in a multitude of other statutes.

(*b*) *R.* v. *Middlesex*, (1850) 1 L. M. & P. 621; 22 L. J. M. C. 42; 86 R. R. 893; *R.* v. *Carew*, (1850) *id.* 626, n.

(*c*) *R.* v. *Derby*, (1850) 1 L. M. & P. 660; 20 L. J. M. C. 44; 90 R. R. 813; *R.* v. *Middlesex*, *supra*; *R.* v. *Worcester*, (1838) 5 Q. B. 508, n.; *R.* v. *Surrey*, (1844) *id.* 506; 13 L. J. M. C. 86.

(*d*) *R.* v. *Warwickshire*, (1837) 6 A. & E. 873; 6 L. J. M. C. 113; *R.* v. *Derbyshire*, (1837) 6 A. & E. 885; 7 L. J. M. C. 91.

(*e*) *R.* v. *Westbury*, (1844) 5 Q. B. 500.

(*f*) *R.* v. *Colerne*, (1850) 11 Q. B. 909; 17 L. J. M. C. 121.

(*g*) *R.* v. *Westbury*, (1844) 5 Q. B. 504, 505.

(*h*) *R.* v. *Surrey*, (1844) 5 Q. B. 506; *R.* v. *Lambeth*, and *R.* v. *Southampton*, (1845) *id.* 513.

(*i*) *R.* v. *Leominster*, (1845) 5 Q. B. 640, 652.

(*k*) 18 & 19 V. c. 120.

(*l*) See *In re Balls & Met. Board of Works*, (1866) L. R. 1 Q. B. 337; 35 L. J. Q. B. 101. See now 51 & 52 V. c. 41, s. 40.

(*m*) 8 Ed. 7, c. 69.

§ 1106. With respect to warrants and other instruments issuing from the Treasury, these may now in all cases be issued under the hands of any two or more of the Commissioners (*n*); and a like convenient rule has been adopted in reference to all orders and other documents emanating from the Commissioners of Customs (*o*).

§ 1107. Whenever it is sought to know whether, when an Act of Parliament renders the signature of a person necessary, a signature by his agent or by procuration will suffice, particular attention must of course be paid to the language employed by the Legislature in each case. In some cases, as for instance in those which fall within the 7th section of the Statute of Frauds (*p*),—the Truck Act (*q*),—the Merchant Shipping Act, 1894 (*r*),—the Pawnbrokers Act, 1872 (*s*),—the English and Irish Acts for Regulating Metropolitan Public Carriages (*t*),—the 6th section of Lord Tenterden's Act (*u*),—the Real Property Limitation Act, 1883 (*v*),—and the 7th section of the Real Property Limitation Act, 1874 (*x*)—it seems to be clear that the signature of an agent, however appointed, will not suffice. In other cases, though the paper may be signed by an agent, yet his authority to do so must be evidenced in writing. For instance, this is expressly required in the 1st and 3rd sections of the Statute of Frauds (*y*).

§ 1108. In other cases, again, the Legislature, while it allows agents to sign the documents, does not require them to act under any written authority. Thus, in cases falling within the 4th (*z*) section of the Statute of Frauds (*a*),—the 8th section of the Real Property Limitation Act, 1874 (*b*),—the Railway and Canal Traffic Act, 1854 (*c*),—the Act of 1833 for the Amendment of the Law (*d*),—and

(*n*) 12 & 13 V. c. 89.
(*o*) 39 & 40 V. c. 36, s. 10.
(*p*) *Ante*, § 1016.
(*q*) *Ante*, § 1095.
(*r*) *Ante*, § 1098.
(*s*) *Ante*, § 1099.
(*t*) *Ante*, § 1099A.
(*u*) *Ante*, § 1085. *Swift* v. *Jewesbury*, (1874) L. R. 9 Ch. 301; 43 L. J. Q. B. 56.
(*v*) *Ante*, § 1088. See *Corp. of Dublin* v. *Judge*, (1847) 11 Ir. L. R. 8, where it was held, that an acknowledgment of title signed by a third party for and in the presence of the person in possession, who was too ill to write, was sufficient to satisfy the Act.
(*x*) 37 & 38 V. c. 57. *Ante*, § 1088.
(*y*) *Ante*, §§ 1001, 1003.
(*z*) See *Heard* v. *Pilley*, (1869) L. R. 4 Ch. 548; 38 L. J. Ch. 718; *Cave* v. *Mackenzie*, (1877) 46 L. J. Ch. 564.
(*a*) *Ante*, §§ 1019, 1020.
(*b*) 37 & 38 V. c. 57; *ante*, § 1088.
(*c*) 17 & 18 V. c. 31, cited *ante*, § 1093; *Aldridge* v. *G. West. Ry.*, (1864) 15 C. B. (N.S.) 582, 599; 33 L. J. C. P. 167; 137 R. R. 667.
(*d*) *Ante*, § 1090. *Morton* v. *Copeland*, 16 C. B. 517; (1855) 24 L. J. C. P. 169; 100 R. R. 823.

Baines's Act (*e*)—an agent authorised merely by parol may sign the respective documents on behalf of his principal; and even though the agent has acted in the first instance without any authority whatever, yet, if the principal by subsequent conduct has recognised and adopted what he has done, this will be sufficient to satisfy the respective statutes (*f*).

§ 1109. The practical effect of these rules,—which rest on no principle, but are the result of arbitrary, if not of accidental, legislation,—is in some instances sufficiently absurd. Thus, while no action can be brought against a man for falsely representing his friend to be a person of substance, unless such representation be in writing signed by himself, any person may be sued on an ordinary guarantee to be answerable for another's debt, if the promise to pay be given in writing by his authorised agent; that is, the latter person, unlike the former, is exposed to be charged by the verbal statement of the party actually signing the promise, that he had authority so to sign (*g*). So, also, while an agent cannot bind his principal by surrendering a lease not exceeding the term of three years, unless he be duly authorised in writing, he may, under a mere oral authority, enter into a contract for the sale of lands; or for the sale of merchandise above the value of ten pounds (*h*). It may here be added that an auctioneer (*i*) is regarded, at the time of the auction (*k*), as the agent of both vendor and purchaser, whether the subject of the sale be lands or goods; and provided the whole contract can be made out from the memoranda and entries signed by him, it is sufficient to bind them both (*l*). A broker, too, is generally considered to be the agent of both buyer and seller; but a factor, except under special circumstances, is the agent of the seller alone (*m*).

§ 1109A. There is no rule to prevent any man from signing a docu-

(*e*) 12 & 13 V. c. 45, *ante*, § 1102.

(*f*) *Maclean* v. *Dunn*, (1828) 4 Bing. 722; 6 L. J. C. P. 184; 29 R. R. 714; *Gosbell* v. *Archer*, (1835) 2 A. & E. 500, 507; *Fitzmaurice* v. *Bayley*, (1860) 9 H. L. C. 78; 131 R. R. 48.

(*g*) *Lyde* v. *Barnard*, (1836) 1 M. & W. 104.

(*h*) *Ante*, §§ 1003, 1019, 1020; 1 Sug. V. & P. 186. See *Hunter* v. *Parker*, (1840) 7 M. & W. 343; 10 L. J. Ex. 281; 56 R. R. 723.

(*i*) This rule would not, except under special circumstances (see *Bird* v. *Boulter*, (1833) 4 B. & Ad. 443; 38 R. R. 285), extend to the auctioneer's clerk; *Peirce* v. *Corf*, (1874) L. R. 9 Q. B. 210; 43 L. J. Q. B. 52.

(*k*) But at that time only (1856) *Mews* v. *Carr*, 1 H. & N. 484; 26 L. J. Ex. 39; 108 R. R. 683.

(*l*) *Emmerson* v. *Heelis*, (1809) 2 Taunt. 38; 11 R. R. 520; *White* v. *Proctor*, (1811) 4 Taunt. 290; 13 R. R. 580; *Kenworthy* v. *Scholfield*, (1824) 2 B. & C. 945; 2 L. J. (O. S.) K. B. 175; 26 R. R. 600; *Wood* v. *Midgley*, (1854) 2 Sm. & G. 115; 97 R. R. 130; *Carrigy* v. *Brock*, (1871) I. R. 5 C. L. 501; *Peirce* v. *Corf*, *supra*; *Rishton* v. *Whatmore*, (1878) 8 Ch. D. 467; 47 L. J. Ch. 629; 1 Sug. V. & P. 188—191.

(*m*) See *Darrell* v. *Evans*, (1862) 31 L. J. Ex. 337; 1 H. & C. 174; 130 R. R. 446. See *ante*, § 1020, n.

ment in a double capacity, first, as agent for one of the contracting parties, and next, in his own right (*n*). Neither is it necessary in such a case that he should sign his name twice over, but the law will be satisfied, if it can be proved by parol evidence that, although apparently signing as a mere agent, he really intended to bind himself as well as his principal (*o*).

§ 1110. Besides the Acts noticed above, and many others of a like nature, which require certain transactions to be evidenced by writing, numerous statutes might be mentioned, which, in order to give validity to documents, render it necessary that they should be executed or attested in a particular form (*p*). It is not here intended to enumerate these statutes; but, before leaving the subject, it may be observed that registers of marriages (*q*), the protest by any person other than a notary public, of a bill of exchange, whether such protest be for non-acceptance or non-payment (*r*); the deed of a father appointing a guardian of his child (*s*); all deeds by which new trustees of property conveyed for religious or educational purposes may now be appointed (*t*);—must respectively be attested by two or more credible witnesses. Every lease made under the Leasing Powers Act for religious worship in Ireland, 1855, must be "by indenture, sealed and delivered by or on behalf of the lessor in the presence of one or more than one witness"; but, singularly enough, the statute does not require that such witness should attest the instrument by attaching his signature to it (*u*). Under the Bills of Sale Acts, 1878 and 1882, "the execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto (*v*); but, since the 18th of August, 1882,—except in the case of an absolute bill of sale (*x*),—it is no longer necessary, as it was under the Act of 1878 (*y*), that any such witness should be a solicitor (*z*).

(*n*) *Young* v. *Schuler*, (1883) 11 Q. B. D. 671.

(*o*) *Id.*

(*p*) As to the mode of executing deeds under powers, see 22 & 23 V. c. 35, s. 12.

(*q*) 6 & 7 W. 4, c. 85, s. 23; 6 & 7 W. 4, c. 86, s. 31.

(*r*) 45 & 46 V. c. 61, ss. 51, 52, 94, and Sch. 1. These protests, so far as inland bills are concerned, are very unusual, and of little, if any, use. See *Windle* v. *Andrews*, (1819) 2 B. & Ald. 696.

(*s*) 12 C. 2, c. 24, §§ 8, 9. The guardian himself may be one of the witnesses, *Morgan* v. *Hatchell*, (1855) 24 L. J. Ch. 135, per Romilly, M.R.

(*t*) 13 & 14 V. c. 28, s. 3; extended by 53 & 54 V. c. 19.

(*u*) 18 & 19 V. c. 39, s. 10, which enacts also that "the counterpart of every such lease shall be executed by the lessee thereof." These words would seem to preclude an agent from executing the counterpart under a power of attorney from the lessee.

(*v*) 45 & 46 V. c. 43, s. 10; 46 V. c. 7, s. 10.

(*x*) *Casson* v. *Churchley*, (1884) 53 L. J. Q. B. 335; *Swift* v. *Pannell* (1883) *id.* Ch. 341; 24 Ch. D. 240.

(*y*) 41 & 42 V. c. 31, s. 10.

(*z*) 45 & 46 V. c. 43, s. 10; 46 V. c. 7, s. 10, Ir.

§ 1111. By the English Debtors Act, 1869, and the Irish Debtors Act, 1872, "a warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall not be of any force, unless there is present some [solicitor] of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which [solicitor] shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be [solicitor] for the person executing the same, and state that he subscribes as such [solicitor]" (*a*). And no warrant or cognovit executed in any other manner shall be "rendered valid, by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same" (*b*).

§ 1112. First, the attesting witness must be an actual solicitor (*c*), though it is not necessary for him to have taken out his certificate (*d*). Secondly, if the defendant introduces a person as a solicitor, he will be estopped from afterwards denying his character—at least, unless he can clearly show that he acted in ignorance (*e*). Thirdly, the solicitor attending on behalf of the defendant must be some person other than the legal adviser, or the agent of the legal adviser, acting for the plaintiff (*f*); and though the statute does not require that the plaintiff should employ a solicitor, yet as he seldom, in fact, proceeds in these matters without the assistance of one, it ought to be perfectly clear, in the event of a single solicitor being present, that he was acting exclusively on behalf of the defendant (*g*). Fourthly, it is not necessary that the solicitor should be originally or spontaneously named by the defendant, or that he should come to the place of meeting at his request; but if he remains there at the defendant's request, and is clearly and expressly adopted by him as his solicitor, this will suffice, though he may have been introduced by the plaintiff himself, or by his legal adviser (*h*). Still, as an introduction from such a quarter

(*a*) 32 & 33 V. c. 62, s. 24; 35 & 36 V. c. 57, s. 23, Ir.

(*b*) 32 & 33 V. c. 62, s. 25; 35 & 36 V. c. 57, s. 24, Ir.

(*c*) *Paul* v. *Cleaver*, (1810) 2 Taut. 360; 11 R. R. 608.

(*d*) *Holgate* v. *Slight*, (1851) 2 L. M. & P. 662; 21 L. J. Q. B. 74.

(*e*) *Cox* v. *Cannon*, (1838) 4 Bing. N. C. 453; 7 L. J. C. P. 288; *Jeyes* v. *Booth*, (1797) 1 Bos. & P. 97; *Wallace* v. *Brockley*, (1837) 5 Dowl. 695; *Price* v. *Carter*, (1845) 7 Q. B. 838; 14 L. J. Q. B. 148.

(*f*) *Mason* v. *Kiddle*, (1839) 5 M. & W. 513; 9 L. J. Ex. 37; *Rising* v. *Dolphin*, (1840) 8 Dowl. 309; *Pryor* v. *Swaine*, (1844) 2 Dowl. & L. 37; 13 L. J. Q. B. 214; *Hirst* v. *Hannah*, (1851) 17 Q. B. 383.

(*g*) *Sanderson* v. *Westley*, (1840) 6 M. & W. 98, 100; *Cooper* v. *Grant*, (1852) 12 C. B. 154; *Hirst* v. *Hannah*, (1851) 17 Q. B. 383; 85 R. R. 500; *Walsh* v. *Nally*, (1877) I. R. 11 C. L. 337.

(*h*) *Walton* v. *Chandler*, (1845) 1 C. B. 306; 14 L. J. C. P. 149; *Taylor* v. *Nicholls*, (1840) 6 M. & W. 91, 95; 9 L. J. Ex. 78; *Bligh* v. *Brewer*, (1834) 1 Cr. M. & R. 651; 4 L. J. Ex. 49; *Oliver* v. *Woodroffe*, (1839) 4 M. & W. 650; 8 L. J.

will always be regarded with distrust, and may often, when taken in conjunction with other suspicious circumstances, raise a strong inference of fraud, it is never advisable for a plaintiff or his solicitor to interfere in this manner (*i*); and the imprudence of such a course will be more apparent, when it is considered, that in all cases of this kind it must distinctly appear, that the defendant was fully aware of his having an option in the choice of his solicitor, and, moreover, that he had an opportunity of exercising such option, and did in fact exercise it (*k*).

§ 1113. Fifthly, the solicitor is not bound to read over the instrument to his client unless desired to do so; but he attends for the purpose of explaining its nature and effect; and even this explanation may be waived, if the client does not require it (*l*). Sixthly, the subscription by the witness must be an actual visible subscription; and, therefore, where it became necessary, in consequence of an alteration having been introduced in a warrant of attorney, to re-execute the instrument, and the witness contented himself with retracing his previous attestation and signature with a dry pen, this was not deemed a sufficient compliance with the requisitions of the statute (*m*). Seventhly, the law does not prevent the solicitor to whom the warrant is addressed, and who is therefore entitled to enter up judgment upon it, from acting as solicitor for the defendant to attest the execution (*n*). Lastly, the memorandum of attestation must be drawn with great care, and in it the subscribing witness must distinctly state two things; first, that he is the solicitor of the party executing the instrument, and next, that he subscribes as such.

§ 1114. No precise form of words is rendered necessary by the Act, but those used must be such as to enable the courts, either directly, or by necessary inference, to collect both the above facts (*o*).

Ex. 105; *Pease* v. *Wells*, (1840) 8 Dowl. 626; *Joel* v. *Dicker*, (1847) 5 Dow. & L. 1; 16 L. J. Q. B. 359; *Nolan* v. *Gumley*, (1863) 14 Ir. C. L. R. 301.

(*i*) *Taylor* v. *Nicholls*, *supra*.

(*k*) *Gripper* v. *Bristow*, (1840) 6 M. & W. 807, 812; 9 L. J. Ex. 324; *Barnes* v. *Pendrey*, (1839) 7 Dowl. 747; *Walker* v. *Gardner*, (1832) 4 B. & Ad. 371.

(*l*) *Taylor* v. *Nicholls*, *supra*; *Oliver* v. *Woodroffe*, *supra*; *Joel* v. *Dicker*, *supra*.

(*m*) *Bailey* v. *Bellamy*, (1841) 9 Dowl. 507; 10 L. J. Q. B. 41. See *ante*, § 1052.

(*n*) *Levinson* v. *Syer*, (1852) 21 L. J. Q. B. 16.

(*o*) Per Parke, B., in *Herbert* v. *Barton*, (1842) 10 M. & W. 683, 684; 12 L. J. Ex. 70. See invalid forms in *Poole* v. *Hobbs*, (1839) 8 Dowl. 113; recognised in *Everard* v. *Poppleton*, (1843) 5 Q. B. 184; 13 L. J. Q. B. 1; 64 R. R. 461. See also *Potter* v. *Nicholson*, (1841) 8 M. & W. 294; 10 L. J. Ex. 311; *Lucey* v. *Murphy*, (1873) Ir. R. 7 C. L. 494; *Hibbert* v. *Barton*, *supra*; *Pocock* v. *Pickering*, (1852) 18 Q. B. 789; 21 L. J. Q. B. 365; *Elkington* v. *Holland*, (1842) 9 M. & W. 659. See examples of valid forms in *Lewis* v. *Lord Kensington*, (1846) 2 C. B. 463; 15 L. J. C. P. 100; 69 R. R. 504; *Phillips* v. *Gibbs*, (1846) 16 M. & W. 208; 16 L. J. Ex. 48; *Gay* v. *Hill*, (1849) 18 L. J. Q. B. 12; *Nolan* v. *Gumley*, (1863) 14 Ir. C. L. R. 301; *Lindley* v. *Girdler*, (1843) 1 Dowl. & L. 53; 13 L. J. Q. B. 53; *Knight* v. *Hasty*, (1843) 12 L. J. Q. B. 293; recognised in *Everard* v. *Poppleton*, *supra*. See, further, *Ledgard* v. *Thompson*, (1843) 11 M. & W. 40; L. J. Ex. 229.

§ 1116. Where the person executing a warrant of attorney, or cognovit, is himself a solicitor, he may dispense with the presence of another solicitor on his behalf; for as solicitors are expressly selected to impart information to others respecting the nature of these instruments, they are presumed to require no advice on such a subject; and not being within the mischief of the statute, its provisions do not apply to them (*p*). But the Act extends to warrants of attorney executed abroad, if sought to be enforced in this country, for the evil, which is intended to be remedied, affects such instruments, equally with those which are executed at home (*q*). The Legislature, apparently by an oversight, has drawn a distinction between warrants of attorney and cognovits; the Act applying equally to all the latter class of instruments, but being confined to such of the former class as relate to personal actions. The result is, that, if a defendant in an action to recover land gives a warrant of attorney to confess judgment, no statutory execution is required (*r*); but if he gives a cognovit for the same purpose, it will be set aside unless duly attested in conformity with the Act (*s*).

§ 1117. As the above provisions were made exclusively for the benefit of defendants, third parties, even though prejudiced by warrants of attorney or cognovits having been given by such defendants to other creditors, cannot object to these instruments on the ground that no solicitor attested their execution (*t*). So, where judgment has been entered up on a warrant of attorney, executed by a principal and his sureties, and one of the sureties has paid the debt and recovered contribution from his co-surety, such co-surety cannot set aside the warrant, and compel the plaintiff to repay him the amount of contribution, on the ground of defective attestation (*u*).

§ 1119. It may here be convenient to notice briefly a few of the principal statutes, which either require or permit the enrolment or registration of particular instruments. One of the most important of these is the Mortmain and Charitable Uses Act, 1888 (*v*), which enacts that all assurances to charitable uses shall be void, unless, among other formalities, they be enrolled (*x*) in the Central Office of the Supreme

(*p*) *Chipp* v. *Harris*, (1839) 5 M. & W. 430; 9 L. J. Ex. 64; *Downes* v. *Garbutt*, (1843) 2 Dowl. N. S. 939; 12 L. J. Q. B. 269.

(*q*) *Davis* v. *Trevanion*, (1845) 2 Dowl. & L. 743; 14 L. J. Q. B. 138.

(*r*) *Doe* v. *Kingston*, (1841) 1 Dowl. N. S. 263; 11 L. J. Q. B. 73.

(*s*) *Doe* v. *Howell*, (1840) 12 A. & E. 696.

(*t*) *Chipp* v. *Harris*, *supra*. See *Pinches* v. *Harvey*, (1841) 1 Q. B. 869; 10 L. J. Q. B. 316.

(*u*) *Price* v. *Carter*, (1845) 7 Q. B. 838; 14 L. J. Q. B. 148.

(*v*) 51 & 52 V. c. 42, s. 4. See also 54 & 55 V. c. 73. For exceptions to the Act, see 53 & 54 V. c. 16, and 9 Edw. 7, c. 44, s. 8.

(*x*) As to proof of such enrolment, see § 1650.

Court, "within six months after the execution thereof." The Clerical Disabilities Act, 1870 (*y*), contains some special provisions for enrolling deeds of relinquishment executed by parsons (*z*). Enrolment of title to land, upon sale, is now necessary under the Land Transfer Act, 1897 (*a*), in those counties or parts of counties to which the Act has been applied by Orders in Council.

§ 1120. Under the old Act of 27 H. 8, c. 16, which was extended to the Counties Palatine by the statute of 5 El., c. 26, no estate of inheritance, or freehold in any lands, tenements, or hereditaments, can pass by bargain and sale, unless such bargain and sale be by deed, enrolled within six months next after its date, either in the Enrolment Department of the Central Office, or in the county where the land lies, before the custos rotulorum, and two justices, and the Clerk of the Peace, or any two of them, the Clerk of the Peace being one. The necessity for enrolment under this Act was, however, soon obviated by the device of conveying the property by means of a lease and a release, neither of which required enrolment under the Act, the necessity for which cumbersome procedure was in its turn in time dispensed with by statute (*b*). The Act, however, still remains in force, and enrolment under its provisions is still occasionally adopted (*c*).

§ 1120A. With the view of preventing frauds upon creditors by the secret transfer of personal property, every warrant of attorney to confess judgment in any personal action, every cognovit actionem given by any person, every judge's order made by consent, and given by a defendant in a personal action, authorising the plaintiff to sign judgment, or issue execution (*d*), and every bill of sale of personal chattels (*e*),—which phrase, it may be noted in passing, will now include fixtures and growing crops when separately assigned or charged (*f*),—is rendered void,—unless within twenty-one days after the security or the consent has been given, in the case of a warrant, cognovit, or judge's order, or within seven days after execution in

(*y*) 33 & 34 V. c. 91.

(*z*) As to proof of the executing and enrolment of such a deed, see *post*, § 1653.

(*a*) 60 & 61 V. c. 65, *post*, § 1126A.

(*b*) 4 & 5 V. c. 21; 8 & 9 V. c. 106, s. 2.

(*c*) By 10 Anne, c. 18, s. 3, an office copy of the enrolment is made as good evidence as the original deed.

(*d*) 32 & 33 V. c. 62, ss. 26, 27; 3 G. 4, c. 39, ss. 1, 2, 3; 6 & 7 V. c. 66. For the corresponding Irish enactments, see 3 & 4 V. c. 105, s. 12; 20 & 21 V. c. 60, ss. 334, 335, Ir.

(*e*) 45 & 46 V. c. 43, s. 8. For a somewhat corresponding Irish enactment, see 42 & 43 V. c. 50, s. 8; and 46 V. c. 7, s. 8, Ir.

(*f*) 41 & 42 V. c. 31, ss. 4, 5; 42 & 43 V. c. 50, s. 4, Ir.; 46 V. c. 7, s. 6. As to the old law so far as it related to growing crops, see *Branton* v. *Griffits*, (1877) 2 C. P. D. 212; 46 L. J. C. P. 408.

the case of a bill of sale (*g*), the instrument, or a true copy thereof (*h*), be filed, together with an affidavit (*i*) of the time when it was executed or given, in the Bills of Sale Department of the Central Office.

§ 1121. All deeds and instruments, whereby any estates or hereditaments shall be purchased, sold, leased, charged, or exchanged under the authority of any Act relating to the possessions and land revenues of the Crown, must be enrolled, within six months after their several dates, in the office of Land Revenue Records and Enrolments (*k*). Similar enactments are contained in the statutes which respectively relate to the possessions of the Duchy of Cornwall (*l*), and to the possessions of His Majesty in respect of the Duchy of Lancaster (*m*); but the instruments requiring enrolment under these Acts must be enrolled in the offices of the respective duchies.

§ 1122. The Act for the Abolition of Fines and Recoveries (*n*) enacts, in section 41, that no assurance, by which any disposition of lands shall be effected under that Act by a tenant in tail, except a lease not exceeding twenty-one years at a rent not less than five-sixths of a rack-rent, shall have any operation by virtue of the Act, unless it be enrolled in what is now called the Enrolment Department of the Central Office (*o*) within six calendar months after its execution; while section 46 provides, that the consent of a protector to the disposition of a tenant in tail shall, if given by a distinct deed, be void, unless the deed be enrolled either at or before the time when the assurance by the tenant in tail shall be enrolled (*p*).

§ 1125. In 1855, a clause was introduced in the Judgments Act (*q*), which enacts in substance, that no annuity or rent-charge, otherwise

(*g*) The registration of every bill of sale must now be renewed every five years, under the authority of 41 & 42 V. c. 31, s. 11; 42 & 43 V. c. 50, s. 11.

(*h*) The omission of the name of the grantor and of the addresses of the attesting witnesses in the copy, these particulars being contained in the affidavit filed with such copy, has been held not to render the bill of sale void: *Coates* v. *Moore*, [1903] 2 K. B. 140; 72 L. J. K. B. 539.

(*i*) As to what the affidavit must contain, see *Jones* v. *Harris*, (1871) L. R. 7 Q. B. 157; 41 L. J. Q. B. 6; *Murray* v. *Mackenzie*, (1875) L. R. 10 C. P. 625; 44 L. J. C. P. 313; *Blount* v. *Harris*, (1879) 48 L. J. Q. B. 159; 4 Q. B. D. 603; *Castle* v. *Downton*, (1879) 5 C. P. D. 56; 49 L. J. C. P. 6; and cases there cited.

(*k*) 10 G. 4, c. 50, s. 63; 2 & 3 W. 4, c. 1, s. 21; 14 & 15 V. c. 42, s. 6; 6 Ed. 7, c. 28.

(*l*) 26 & 27 V. c. 49, ss. 30—33; 7 & 8 V. c. 65, ss. 30—36; 11 & 12 V. c. 83, s. 6.

(*m*) 11 & 12 V. c. 83, s. 14.

(*n*) 3 & 4 W. 4, c. 74.

(*o*) See 42 & 43 V. c. 78, s. 5; R. S. C. Ord. LXI. R. 1.

(*p*) See also sections 49, 51, 52, and 59 of 3 & 4 W. 4, c. 74, for further provisions respecting enrolment. As to proof of such enrolment, see *post*, § 1650A.

(*q*) 18 & 19 V. c. 15, s. 12.

than by marriage settlement (*r*), for life or lives, or for any term or estate determinable on life or lives, shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless a memorandum containing the name, residence, and description of the person whose estate is intended to be affected, and the date of the instrument, and the annual sum payable, be left for registration in the Enrolment Department of the Central Office (*s*). It has been held by the Court of Appeal that an unregistered annuity-deed may still be enforced as against any subsequent incumbrancer or purchaser who may have taken with notice of its existence (*t*).

§ 1126. The written contract between an articled clerk and the solicitor to whom he is bound, must be enrolled with the Registrar of Solicitors (*u*), within six months after its date (*v*).

§ 1126A. The Land Transfer Act, 1875 (*x*), with the object of simplifying the title to, and facilitating the transfer of land, established a land registry, and provided that any person who has contracted to buy, or is entitled for his own benefit to, or is capable of disposing for his own benefit of, an estate in fee simple in land, may apply to the registrar to be registered as proprietor of such land with either an absolute or possessory title, and upon satisfying the registrar as to the title proposed to be registered (*y*), to be registered accordingly, and to have a land certificate, showing his title, granted to him. Registration with an absolute title confers upon the person registered a statutory estate in fee simple (*z*), and registration with a possessory title confers a similar estate subject to rights and interests existing at the time of first registration (*a*). Leasehold land held under a lease for a life or lives, determinable on a life or lives, or for a term of which more than twenty-one years are unexpired may similarly be registered. Notwithstanding the advantages accruing from registration under the Act it has been but little adopted in practice; now, however, by the Land Transfer Act, 1897 (*b*), it is provided that it may

(*r*) Annuities and rent-charges given by will are also excluded from the provision. See section 14 of the Act.

(*s*) The words of the Act are, "with the senior Master of the Court of Common Pleas." As to proof of enrolment, see § 1650.

(*t*) *Greaves* v. *Tofield*, (1880) 14 Ch. D. 563; 50 L. J. Ch. 118.

(*u*) The Solicitors Act, 1888 (51 & 52 V. c. 65), s. 7.

(*v*) By section 8, the enrolment may, subject to certain conditions, be made after six months.

(*x*) 38 & 39 V. c. 87, amended by 60 & 61 V. c. 65. These Acts do not apply to Scotland or Ireland.

(*y*) Section 6, as to estates in fee-simple, sections 12—15 as to leaseholds. See also Land Transfer Rules, 1898.

(*z*) Section 7.

(*a*) Section 8.

(*b*) 60 & 61 V. c. 65, amending the Act of 1875 in various particulars.

be declared by Order in Council that registration of title to land in any specified county or part of a county mentioned in the Order, is to be compulsory on sale, and thereupon a person shall not, under any conveyance on sale executed on or after the day specified, acquire the legal estate in any freehold land in that county or part of a county, unless or until he is registered as proprietor of the land (*c*).

§ 1127. Other statutes which permit (*d*) enrolments to be made, are—the Yorkshire Registries Act (*e*); the Act applicable to the registration of land in Middlesex (*f*); the Act which governs the registration of deeds, &c., in Ireland (*g*); the Charitable Trusts Act, 1855, which enacts, that any deed, will, or document relating to any charity may be enrolled in the office of the Charity Commissioners, and may be proved by copies certified under the hand of the secretary or one of the Commissioners (*h*); and the Act of 3 & 4 W. 4, c. 87, which,—after reciting that by divers Acts of Inclosure the awards of the Commissioners are required to be enrolled, but that such enrolments have in many instances been omitted,—goes on to enact, that the awards not enrolled shall still be valid, but that the parties interested may enrol them if they think proper (*i*).

(*c*) Section 20. The provision that a person shall not under a conveyance on sale acquire the legal estate, unless and until he is registered as proprietor, is limited to the first registration, and, after the land is once upon the register, an unregistered disposition will pass the property in the land, but will be liable to be defeated by a subsequent registered transfer: *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631; 72 L. J. Ch. 336.

(*d*) See *Agra Bk.* v. *Barry*, (1874) L. R. 7 H. L. 155; and *In re Lambert's Estate*, (1884) 13 L. R. Ir. 234, 241, per Ct. of App., as to the prejudicial results which may occur to any man who, having an instrument capable of registration in a registry county, omits to register it.

(*e*) 47 & 48 V. c. 54; and see notes to §§ 1645, 1648, 1654, and 1840. As to proof of the enrolment, see § 1652A. Under the former Acts, for which this Act is now substituted, where there was a contest as to priority between a registered and unregistered mortgage, even though they were not under seal, and therefore only equitable charges, a registered charge had the priority over an unregistered one: *In re Wright's Mortgage Trust*, (1873) 16 Eq. 41. A further charge in favour of even a first mortgagee of land in the registry county requires registration. See *Chadwick* v. *Turner*, (1866) L. R. 1 Ch. 310; 35 L. J. Ch. 349; and *Credland* v. *Potter*, (1874) L. R. 10 Ch. 8; 44 L. J. Ch. 169.

(*f*) 7 A. C. 20, amended by the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 V. c. 10), by which the duties of the Middlesex Registry have been transferred to the Land Registry. An instrument charging lands in Middlesex, though it he not a deed, ought to be registered: *Neve* v. *Pennell*, (1863) 2 New R. 508; *Moore* v. *Culverhouse*, (1860) 27 Beav. 639; 29 L. J. Ch. 419; 122 R. R. 570. See last note; and as to proof of enrolment, *post*, § 1625B.

(*g*) 6 A. C. 2 (Ir.), on the construction of which see *Carlisle* v. *Whaley*, (1867) L. R. 2 H. L. 391; and *post*, § 1652.

(*h*) 18 & 19 V. c. 124, s. 42. As to proof of the enrolment, see *post*, § 1650.

(*i*) Sections 1, 2. As to proof of the enrolment, see *post*, §§ 1646, 1647.

CHAPTER XIX.

ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

§ 1128. PERHAPS the most difficult branch of the law of evidence is that which regulates the *admissibility of extrinsic parol testimony to affect written instruments.* In proceeding to discuss the rules of law connected with this subject, it will be well to advert to one or two established principles, which govern the interpretation of all writings. First, parol evidence is admissible to show under what surrounding circumstances an instrument was executed (*a*); next, in order to put a just construction upon the language of any document, the court must read the whole of it, and must determine the meaning of the words employed in the passage under discussion, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument (*b*). For it is obvious that the language of a particular passage may be capable of bearing a wider or narrower signification, when read in connexion with other parts of the instrument where the same language is employed, than it would have borne, had no such reflected light been thrown upon it. As Lord Cairns forcibly put it, the writer of the instrument has often himself "made us a dictionary" by which to read it (*c*). For instance, suppose a question to arise respecting the meaning of the word "close" as used in a will. If this expression were only to occur once, evidence would be admissible to show, that, in the county where the property was situate, it denoted a farm; but if the word were found in other parts of the will, in any one of which this enlarged meaning could not be applied to it, such evidence would be clearly rejected, as the court would then see that the testator had used the word in its ordinary sense, as denoting an enclosure (*d*). Similar principles have been applied to interpret the words "nephews and nieces" (*e*); "relatives"; "cousins" (*f*); and

(*a*) *Grahame* v. *Grahame*, (1887) 19 L. R. Ir. 249, *post*, § 1194.

(*b*) *Blundell* v. *Gladstone*, (1841) 1 Phill. 279, 283, 289; 12 L. J. Ch. 225; 73 R. R. 257; *Bateman* v. *Ld. Roden*, (1844) 1 Jo. & Lat. 356, 268-370; 68 R. R. 253.

(*c*) *Richardson* v. *Watson*, (1833) 4 B. & Ad. 787, 799; 2 L. J. K. B. 134; 38 R. R. 366.

(*d*) *Hill* v. *Crook*, (1873) L. R. 6 H. L. 265; 42 L. J. Ch. 702; adopted by Jeune, P., *In the goods of Ashton*, [1892] P. 83; 61 L. J. P. D. & A. 85. See *Grant* v. *Grant*, (1869) L. R. 2 P. & D. 8; 39 L. J. P. & M. 17; and *post*, § 1195.

(*e*) *Grant* v. *Grant*, *supra*; *Miles* v. *Wilson*, [1903] 1 Ch. 138; 72 L. J. Ch. 39.

"children" (*g*). So the word "month," which denotes at law a lunar month, may be shown by the context to mean a calendar month, and the judge will in such case adopt that construction (*h*). So, when words used in the operative part of a deed are of doubtful import, the recitals and other parts of the instrument will often furnish an excellent test for discovering the real intention of the parties, and will enable the court to fix the true meaning of the language employed (*i*).

§ 1129. Again, if the point at issue were whether a legacy, given by a codicil to a legatee under the will, should be regarded as cumulative or substitutionary, the court would certainly be justified in looking, not only to other parts of the same codicil, but to bequests in other later testamentary instruments; and if it should appear that, in these later codicils, the testator had used the words "in addition," when making bequests to other parties which were intended to be cumulative, the absence of these words, or of expressions of equivalent import, in regard to the legacy in question, would be a circumstance, though far short of conclusive, yet tending to show, in connexion with other facts and arguments, that the later legacy was intended not to be additional, but in substitution. The court, in such a case, would be bound to carry back and apply to the first codicil the knowledge it had acquired by examining the language of the later bequests (*k*).

§ 1130 (*l*). If the instrument consists partly of a printed formula, and partly of written words, and any reasonable doubt is felt (*m*) as to the meaning of the whole, the written words are entitled to have greater effect in the interpretation, than those which are printed (*n*); they being the immediate language selected by the parties themselves for the expression of their meaning, while the printed formula is more general in its nature, applying equally to their case and to that of all other contracting parties on similar subjects and occasions (*o*).

(*f*) *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304; 61 L. J. Ch. 70; *Re Blower's Trusts*, (1871) 11 Eq. 97; 42 L. J. Ch. 24; *In the goods of Ashton*, *supra*.

(*g*) *Danily* v. *Platt*, (1892) 40 W. R. 475; 61 L. J. Ch. 415.

(*h*) *Lang* v. *Gale*, (1813) 1 M. & S. 111; *R.* v. *Chawton*, (1841) 1 Q. B. 247; 10 L. J. M. C. 55; 55 R. R. 246. See *ante*, § 16.

(*i*) *Walsh* v. *Trevanion*, (1850) 15 Q. B. 733, 751; 19 L. J. Q. B. 458; 81 R. R. 775; *Pallikelagatha Marcar* v. *Sigg*, (1880) L. R. 7 Ind. App. 83, 100.

(*k*) *Lee* v. *Pain*, (1844) 4 Hare, 218—221, 236; 14 L. J. Ch. 346; 67 R. R. 41; *Russell* v. *Dickson*, (1842) Di. & W. 139; 59 R. R. 674; *Darley* v. *Martin*, (1853) 13 C. B. 684; 22 L. J. C. P. 249; 93 R. R. 688.

(*l*) Gr. Ev. § 278, almost verbatim.

(*m*) But not otherwise. See *The Nifa*, [1892] P. 411; *Scrutton* v. *Childs*, (1877) 36 L. T. 212.

(*n*) This rule is embodied in the N. York Civ. Code, § 1695.

(*o*) Per Ld. Ellenborough, in *Robertson* v. *French*, (1803) 4 East, 136; 7 R. R. 535; *Gumm* v. *Tyrie*, (1864) 33 L. J. Q. B. 108, per Crompton, J., and 111, per

§ 1131. Next, the terms of every document must, in the absence of all parol testimony, be construed in their primary sense, unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, they must be understood in some other and peculiar sense (*p*). But it may be said, what is the primary sense of a word? and this is a question which, in some cases, may be more easily asked than answered (*q*). It may, however, be stated generally, that if the language be technical or scientific, and be used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning (*r*); but if, on the other hand, the expressions have reference to the common transactions of life, they will be interpreted according to their plain, ordinary, and popular meaning (*s*). Evidence

Blackburn, J. See *Jessel* v. *Bath*, (1767) L. R. 2 Ex. 267. In America it has been held that if a contract refer to a plan which is inconsistent with it, the contract itself will prevail: *Smith* v. *Flanders*, (1880) 129 Mass.; 36 L. J. Ex. 149.

(*p*) *Robertson* v. *French*, *supra*; *Mallan* v. *May*, (1844) 13 M. & W. 517; 14 L. J. Ex. 48; 67 R. R. 707; *Carr* v. *Montefiore*, (1864) 5 B. & S. 408; 32 L. J. Q. B. 256; 136 R. R. 618; *Ford* v. *Ford*, (1848) 6 Hare, 490; 77 R. R. 203; *Hicks* v. *Sallitt*, (1854) 23 L. J. Ch. 571, 578; 98 R. R. 311; *Boorman* v. *Johnston*, (1834) 12 Wend. 573. See also *Rhodes* v. *Rhodes*, (1882) 7 App. Cas. 192; 51 L. R. Pr. C. 53; *Gray* v. *Pearson*, (1851) 6 H. L. C. 106; 26 L. J. Ch. 473; 108 R. R. 19; *Abbott* v. *Middleton*, (1858) 7 *id.* 68; 28 L. J. Ch. 110; 115 R. R. 38; *Slingsby* v. *Grainger*, (1859) *id.* 283, 284; 28 L. J. Ch. 616; 115 R. R. 146; *Wing* v. *Angrave*, (1860) 8 *id.* 215; 30 L. J. Ch. 65; 125 R. R. 99; *Gordon* v. *Gordon*, (1871) L. R. 5 H. L. 254; *Ex parte Walton*, *re Levy*, (1881) 50 L. J. Ch. 657; 17 Ch. D. 750. See *Bathurst* v. *Errington*, (1877) 2 App. Cas. 698; 46 L. J. Ch. 748; *Holt* v. *Collyer*, (1881) 16 Ch. D. 718; 50 L. J. Ch. 311. Accordingly, evidence that the parties only meant that it had not lapsed by non-payment of certain patent fees is not admissible to qualify a covenant that a patent "is in full force and effect". *Chemical Electric Light, &c., Co.* v. *Howard*, (1890) 150 Mass. 496 (Am.). And where a contract is for "half" of certain property, it cannot be shown by parol evidence that the parties really meant less than half: *Butler* v. *Gale*, (1855) 27 Vern. 739 (Am.). If it be doubtful whether a word is used in its ordinary sense or not, it is for a jury to say how this is: *Simpson* v. *Margetson*, (1847) 11 Q. B. 23; 17 L. J. Q. B. 81; 75 R. R. 278.

(*q*) See *Doe* v. *Perratt*, (1843) 6 Man. & G. 314, where the judges, in delivering their opinions, differed widely upon the question, as to whether the word "heir" in a will was to be construed in its technical or popular sense. See also *Wells* v. *Wells*, (1874) 18 Eq. 504; 43 L. J. Ch. 681, where Jessel, M.R., held, in opposition to some authorities, that "nephew" meant blood nephew, and did not include the son of a husband's sister. This, however, appears to depend in every case upon the particular will and the evidence; no hard and fast rule can be laid down: *Miles* v. *Wilson*, [1903] 1 Ch. 138; 72 L. J. Ch. 39. See also *Merrill* v. *Morton*, (1881) 50 L. J. Ch. 240; 17 Ch. D. 382.

(*r*) *Shore* v. *Wilson*, (1842) 9 Cl. & Fin. 525; 57 R. R. 2; *Doe* v. *Perratt*, *supra*.

(*s*) *Robertson* v. *French*, *supra*; *Shore* v. *Wilson*, *supra*. Evidence is admissible to show that expressions used in a will had acquired appropriate meaning, either generally or by local usage, or amongst particular classes; and where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under surrounding circumstances, the sense and meaning of the language may be ascertained by evidence outside the instrument: *In re Rayner*, [1904] 1 Ch. 176; 73 L. J. Ch. 111. The rules for the interpretation of wills, laid down by Sir J. Wigram in his treatise on that subject, may be safely applied, *mutato nomine*, to all other private instruments. They are contained in seven

that expressions were used in a technical sense ought not to be admitted without a distinct averment as to the particular words to which such evidence is proposed to be directed, and as to the precise technical or trade meaning which it is sought to attribute to them (*t*).

§ 1132. Bearing the above principles in mind, the first general rule which it will be necessary to notice, respecting the admissibility of extrinsic evidence to affect what is in writing is, that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the*

propositions, as the result both of principle and authority, and are thus expressed :— "I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable. IV. Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property, which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—courts of law, in certain special cases, admit extrinsic evidence of intention, to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined : where the object of a testator's bounty, or the subject of disposition (*i.e.*, person or thing intended) is described in terms, which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigr. Wills, 10—13.

(*t*) *Sutton* v. *Ciceri*, [1890] 15 App. Cas. 144, per Lord Watson.

terms of a valid written instrument (*u*). This rule of the common law, which may be traced back to a remote antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, "the uncertain testimony of slippery memory" (*v*). When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, or, in other words, a complete contract (*x*), it is only reasonable to presume, that they have introduced into the written instrument every material term; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong (*y*).

§ 1133. Independent, too, of all considerations of convenience, the Legislature has, by positive enactment, adopted the same rule in several cases as an arbitrary and absolute one; and by requiring certain dispositions of property, and other transactions, to be evidenced by writing—as, for instance, wills, contracts within the Statute of Frauds, and the like (*z*)—has rigidly excluded all parol testimony tending to vary the terms contained in the written instrument (*a*). The statutory rule will perhaps be more strictly enforced than that which rests on the common law alone, because, in the former case, to relax the rule in any degree, is to the like extent to repeal the particular Act which renders the writing necessary (*b*). The term, "written instrument," as used in the rule, includes not only records, deeds, wills, and other instruments required by the statute or common

(*u*) *Goss* v. *Ld. Nugent*, (1833) 5 B. & Ad. 64, 65; 2 L. J. K. B. 127; 39 R. R. 392; *In re Huxtable*, [1902] 2 Ch. 793; 71 L. J. Ch. 876. So, by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses," Tait, Ev. 326, 327; 1 Dickson, Ev. 92, *et seq.* 118; *Inglis* v. *Buttery*, (1878) 3 App. Cas. 552.

(*v*) *Lady Rutland's Case*, (1605) Co. 5 Rep. 26 *a*, 1st Res.

(*x*) See *Johnson* v. *Appleby*, (1874) 43 L. J. C. P. 146.

(*y*) *Preston* v. *Merceau*, (1775) 2 W. Bl. 1249; *Rich* v. *Jackson*, (1794) 4 Bro. C. C. 519; *Adams* v. *Wordley*, (1836) 1 M. & W. 374; 5 L. J. Ex. 158; *Parteriche* v. *Powlet*, (1742) 2 Atk. 383; *Bayard* v. *Malcolm*, (1806) 1 Johns. 467 (Am.).

(*z*) See *ante*, § 986, *et seq.*

(*a*) Wigr. Wills, 4, 6—8, 125, 126.

(*b*) Wigr. Wills, 4, 6—8, 125, 126; *Miller* v. *Travers*, (1832) 8 Bing. 250, 251; 1 L. J. Ch. 157; 34 R. R. 703; *Doe* v. *Hiscocks*, (1839) 5 M. & W. 369; 9 L. J. Ex. 27; 52 R. R. 748; *Clayton* v. *Ld. Nugent*, (1844) 13 M. & W. 205; 13 L. J. Ex. 363; 67 R. R. 560, per Alderson, B., 208, per Rolfe, B.

law to be in writing, but every document, which contains the terms of a contract between different parties, and is designed to be the repository and evidence of their final intentions (*c*).

§ 1134. To other less formal documents the rule does not extend; and, therefore, except in some few special cases (*d*), a receipt, so far as it is a mere admission (*e*), is not conclusive evidence of the payment therein acknowledged to have been made, but the party signing it may invalidate its effect by oral evidence, not only of fraud, but of mistake or surprise on his part; and in short, the document, like any verbal statement made by a person, and afterwards given in evidence to affect him, amounts only to *primâ facie* proof, and is capable of being explained (*f*). So, an order for goods, insufficient to satisfy the Statute of Frauds, or a loose memorandum, which does not seem to have been intended by the parties to contain the terms of their contract, will not exclude parol evidence on that subject. For instance, where the defendant, having ordered goods by an unsigned letter, which did not mention any time for payment, afterwards accepted the goods which the plaintiff forwarded to him with the invoice, the court held, in an action for their price, that parol evidence was admissible to show that the goods were really supplied on a credit, which had not expired at the commencement of the suit (*g*). So, where a plaintiff had bought and paid for a horse on a verbal warranty by the defendant, and shortly after the purchase was completed, the defendant gave him a paper in the following form:—"Bought of A. B., a horse for £7—A. B."—the court, in an action for breach of warranty, held that the plaintiff might prove the warranty by parol evidence, as the paper appeared to have been meant merely as a memorandum of a transaction, or an informal receipt for the money, and not as containing the terms of the contract itself (*h*). So, where a person, after having agreed to hire a horse, had given the owner a card, on which he had written in pencil, "six weeks at two guineas,

(*c*) *Woolam* v. *Hearn*, (1802) 7 Ves. 218; 6 R. R. 113; *Shore* v. *Wilson*, (1842) 9 Cl. & Fin. 540; 57 R. R. 2; *Stackpole* v. *Arnold*, (1814) 11 Mass. 31. And see *Bank of Australia* v. *Palmer*, [1897] A. C. 540; 66 L. J. P. C. 105.

(*d*) See *ante*, §§ 96, 845.

(*e*) But perhaps so far as (*e.g.*, in a bill of lading) it is evidence of a contract it cannot be contradicted. See *Stratton* v. *Rastall*, (1788) 2 T. R. 366; *Almer* v. *George*, (1808) 1 Camp. 392; and American authorities collected in Greenleaf on Ev. (15th ed.) § 305.

(*f*) *Farrar* v. *Hutchinson*, (1839) 9 A. & E. 341, 643; 8 L. J. Q. B. 107; *Skaife* v. *Jackson*, (1824) 3 B. & C. 421; 3 L. J. (O.S.) K. B. 43; *Lee* v. *Lancs. & Yorks. Ry.*, (1871) L. R. 6 Ch. 527; *Wallace* v. *Kelsall*, (1840) 7 M. & W. 273, 274; 10 L. J. Ex. 12; 56 R. R. 707; *Fuller* v. *Crittenden*, (1832) 9 Conn. 406 (Am.): *a fortiori* other modes of payment may be shown, although the bill-head of the account rendered says: "All bills to be paid to —— and receipted by him" · *Kershaw* v. *Kershaw*, (1875) 119 Mass. (Am.).

(*g*) *Lockett* v. *Nicklin*, (1848) 2 Ex. 93; 76 R. R. 502. See § 1151, *post*.

(*h*) *Allen* v. *Pink*, (1838) 4 M. & W. 140; 7 L. J. Ex. 206; 51 R. R. 503.

W. H.,'' the owner was allowed to prove by parol evidence, not indeed a different time of hiring or a larger rate of payment than those stated in the memorandum, but an additional term of the contract, namely, that all accidents occasioned by the shying of the horse should be at the risk of the hirer (*i*). Again, in the sale of a chattel under the value of £10, an auctioneer is not bound by the description of the article contained in the unsigned printed catalogue; but if, when the article was put up to auction, he publicly stated in the hearing of the purchaser that the description was incorrect, he will be entitled to a verdict for the price on giving parol proof of such statement (*k*).

§ 1135. Having thus pointed out the class of written instruments to which the rule applies, it may next be observed that the rule does not prevent parties to a written contract from proving that, either contemporaneously or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter (*l*). Still less does the rule exclude evidence of an oral agreement (*m*), which constitutes a condition precedent on which the performance of the written agreement is to depend (*n*). Again, the rule is not infringed by the admission of parol evidence, under proper pleading, showing that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter, or for want of due execution and delivery (*o*). For instance,—to illustrate the last ground of invalidity first—it may be shown by parol evidence, either that an instrument, apparently executed as a deed, had really been delivered simply as an

(*i*) *Jeffery* v. *Walton*, (1816) 1 Stark. 267. For other instances, see *ante*, § 406.

(*k*) *Eden* v. *Blake*, (1845) 13 M. & W. 614; 14 L. J. Ex. 194; 67 R. R. 757. As to examinations of prisoners, see *ante*, §§ 893, 894.

(*l*) *Lindley* v. *Lacey*, (1864) 17 C. B. (N.S.) 578; 142 R. R. 525; 34 L. J. C. P. 7; *Morgan* v. *Griffith*, (1871) L. R. 6 Ex. 70; 40 L. J. Ex. 46. See *post*, § 1147; also *Brady* v. *Oastler*, (1864) 3 H. & C. 112; 33 L. J. Ex. 300; 140 R. R. 338; *Malpas* v. *London & S. W. Ry.*, (1866) L. R. 1 C. P. 336; 35 L. J. C. P. 166. Thus where a lease contains no reference to the drainage, evidence was admitted to prove a collateral warranty that the drains were in good order: *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; 70 L. J. K. B. 533; but such evidence is not admissible to enlarge the scope of a warranty which is contained in the written contract; *Lloyd* v. *Sturgeon Falls Pump Co.*, (1901) 85 L. T. 162. An oral stipulation that an instrument is not to become binding unless and until some stipulation be first fulfilled may always be shown. See *Lindley* v. *Lacey*, *supra*; *Wallace* v. *Littell*, (1861) 11 C. B. (N.S.) 369; 31 L. J. C. P. 100; 132 R. R. 591; *Morgan* v. *Griffith*, *supra*. Where an instrument is not formal, it may often be shown that some additional and supplementary agreement was made contemporaneously with the principal one. See *supra*, § 1134; and Greenleaf on Ev. (15th ed.) § 304, and notes.

(*m*) *E.g.*, that a bill or mortgage was only to stand as security for certain moneys, or otherwise to show the real nature of a transaction. See *Trench* v. *Doran*, (1887) 20 L. R. Ir. 338.

(*n*) *Lindley* v. *Lacey*, *supra*.

(*o*) *Gun* v. *Mc Carthy*, (1884) 13 L. R. Ir. 304; *Collins* v. *Blantern*, (1766) 2 Wils. 341; 1 Smith, L. C. 412, and cases there cited in the notes; *Paxton* v. *Popham*, (1808) 9 East, 421.

escrow (*p*), or that a document signed as an agreement, had not been intended by the parties to operate as a present contract, but that it was meant to be conditional on the happening of an event which had never occurred (*q*). Fraud practised by the party seeking the remedy upon him against whom it is sought, and in that which is the subject-matter of the action or claim, is universally held fatal to his title. "The covin," says Lord Coke, "doth suffocate the right."

§ 1136. It matters not, in this respect, whether the foundation of the claim be a record (*r*), a deed, or a writing without seal; for in either case the instrument will be void—or, to speak more correctly, will be voidable at the option of the injured party (*s*)—if obtained by fraud, and the fraud may be established by parol evidence (*t*). Thus, if a person has been induced by verbal fraudulent statements to enter into a written contract for the purchase of a house, a ship, or the like, it is competent for him, in an action for a deceitful representation, to prove the fraud by evidence aliundè, though the written contract or the deed of conveyance is silent on the subject to which the fraudulent representations refer (*u*). So, the representation of a vendor respecting some particular quality of the article sold, may be given in evidence, if the purchaser has thereby been fraudulently prevented from discovering a fault which the vendor knew to exist (*v*). The declarations, too, of a testator are admissible to show his intentions, if the will be impeached on the ground of fraud, circumvention, or forgery (*x*); and similar evidence will be received with the view of rebutting the presumption, that an alteration, or interlineation,

(*p*) *London Freehold and Leasehold Property Co.* v. *Suffield*, [1897] 2 Ch. 608; 66 L. J. Ch. 790; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; 66 L. J. Ch. 144; *Murray* v. *Ld. Stair*, (1823) 2 B. & C. 82; 26 R. R. 282.

(*q*) *Pym* v. *Campbell*, (1856) 25 L. J. Q. B. 277; 6 E. & B. 370; 106 R. R. 632; *Davis* v. *Jones*, (1856) 17 C. B. 625; 25 L. J. C. P. 91; 104 R. R. 819. See also *Wallis* v. *Littell*, (1861) 31 L. J. C. P. 100; 11 C. B. (N.S.) 369; 132 R. R. 591; *Rogers* v. *Hadley*, (1863) 32 L. J. Ex. 241; 133 R. R. 652; *Gudgen* v. *Besset*, (1856) 6 E. & B. 986; 26 L. J. Q. B. 36; 106 R. R. 899. The same doctrine applies to wills, though it must be used with very great caution; *Lister* v. *Smith*, (1863) 33 L. J. P. & M. 29; 3 Sw. & Tr. 282.

(*r*) See *post*, § 1713.

(*s*) *Urquhart* v. *Macpherson*, (1878) 3 App. Cas. 831; *Clarke* v. *Dickson*, (1858) E. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583.

(*t*) Tait, Ev. 327, 328; *Buckler* v. *Millerd*, (1689) 2 Ventr. 107; *Filmer* v. *Gott*, (1774) 4 Bro. P. C. 230; *Robinson* v. *Ld. Vernon*, (1859) 29 L. J. C. P. 135; 7 C. B. N. S. 231; 121 R. R. 472; *Rogers* v. *Hadley*, *supra*; *Taylor* v. *Weld*, (1809) 5 Mass. 116; *Franchot* v. *Leach*, (1826) 5 Cowen 508; *Dorr* v. *Munsell*, (1816) 13 Johns. 431; *Morton* v. *Chandler*, (1831) 8 Greenl. 9; *Com.* v. *Bullard*, (1812) 9 Mass. 270.

(*u*) *Dobell* v. *Stephens*, (1825) 3 B. & C. 623; 3 L. J. (O.S.) K. B. 89; 27 R. R. 441; *Wright* v. *Crookes*, (1840) 1 Scott, N. R. 685, 698; 56 R. R. 587; *Hotson* v. *Browne*, (1860) 30 L. J. C. P. 106; 9 C. B. (N.S.) 442; 127 R. R. 713.

(*v*) *Kain* v. *Old*, (1824) 2 B. & C. 634; 2 L. J. (O.S.) K. B. 102; 26 R. R. 497.

(*x*) *Doe* v. *Hardy*, (1836) 1 M. & Rob. 525; 42 R. R. 820; *Doe* v. *Allen*, (1799) 8 T. R. 147.

apparent on the face of the will, was made after its execution (*y*). For this last purpose, however, the declarations of the testator must have been made before the writing was executed, though it matters not whether the instrument be, or be not, a holograph will (*z*).

§ 1137 (*a*). Parol evidence may also, under a proper pleading, be offered to show that the contract was made for the furtherance of objects forbidden, either by statute, or by common law (*b*); or that the writing was obtained by improper means, such as duress (*c*); or that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture (*d*), idiotcy, insanity, or intoxication (*e*); or that the instrument came into the hands of the plaintiff without any absolute and final delivery by the obligor or party charged (*f*).

§ 1138. The want or failure of consideration may also be proved by parol evidence, showing that the written agreement is not binding (*g*); unless it be under seal, which, in the absence of fraud, is conclusive evidence of a sufficient consideration (*h*), and is strong presumptive evidence that the consideration stated is the true consideration (*i*). But, if no consideration, or a mere nominal consideration, be stated in a deed, the party will be allowed to prove a real substantial consideration by extrinsic evidence (*k*); and if the deed is expressed to be made "for divers good considerations," it may be averred and

(*y*) *Doe* v. *Palmer*, (1851) 16 Q. B. 747; 20 L. J. Q. B. 367; 83 R. R. 716; *In re Duffy*, (1871) I. R. 5 Eq. 506; *Dench* v. *Dench*, (1877) 46 L. J. P. & M. 13; 2 P. D. 60.

(*z*) Id. See *In re Hardy*, (1861) 30 L. J. P. & M. 142; *Staines* v. *Stewart*, (1862) 31 L. J. P. & M. 10; 2 Sw. & Tr. 320; *In re Ripley*, (1858) 1 Sw. & Tr. 268; *Johnson* v. *Lyford*, (1868) L. R. 1 P. & D. 546; 37 L. J. P. & M. 65.

(*a*) Gr. Ev. § 284, in part.

(*b*) *Collins* v. *Blantern*, (1766) 2 Wils. 347; *Benyon* v. *Nettlefold*, (1850) 3 Mac. & G. 91; 20 L. J. Ch. 186; 87 R. R. 25; see also *Biggs* v. *Lawrence*, (1789) 3 T. R. 454; 1 R. R. 740; *Waymell* v. *Reed*, (1794) 5 T. R. 600; 2 R. R. 675; *Doe* v. *Ford*, (1835) 3 A. & E. 649; *Sinclair* v. *Stevenson*, (1824) 1 C. & P. 582; 3 L. J. C. P. 61; *Norman* v. *Cole*, (1800) 3 Esp. 253.

(*c*) 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23. In practice, where there is a conflict of testimony, it is often very difficult to establish that a written contract, apparently complete, never really became a binding one, because it was not intended by the parties to be so until a condition precedent, which is only shown by oral evidence, had been fulfilled.

(*d*) 2 Inst. 482, 483; B. N. P. 172; 5 Com. Dig., Plead. 2, W. 18—23.

(*e*) B. N. P. 172; *Barrett* v. *Buxton*, (1826) 2 Aik. 167 (Am.).

(*f*) B. N. P. 172; *Clark* v. *Gifford*, (1833) 10 Wend. 310; *U. S.* v. *Leffler*, (1837) 11 Pet. 86.

(*g*) *Foster* v. *Jolly* (1835) 1 Cr. M. & R. 707; 4 L. J. Ex. 65; 40 R. R. 685; *Solly* v. *Hinde*, (1834) 2 C. & M. 516; 3 L. J. Ex. 151; 39 R. R. 830; *Abbott* v. *Hendricks*, (1840) 1 Man. & G. 791, 794—796; 10 L. J. C. P. 51; 56 R. R. 542; ante, § 1023.

(*h*) *Ante*, § 86.

(*i*) *Barton* v. *Bank of New South Wales*, (1890) 15 App. Cas. 379.

(*k*) *Liefchild's Case*, (1865) L. R. Eq. 231; *Peacock* v. *Monk*, (1748) 1 Ves. Sen. 128.

proved by parol that the bargainee gave money for his bargain (*l*). The onus, however, of proving the consideration will, in such a case, lie on the party claiming under the deed; for the mere statement in the operative part of an instrument that it was made for good and valuable consideration will not suffice to raise a presumption, as against parties disputing the validity of the deed, that any substantial consideration has ever in fact been given (*m*). When an instrument even under seal specifies any particular consideration, as, for instance, love and affection, and omits all mention of any other consideration, extrinsic proof of another can in general be given, unless upon the construction of the deed the consideration stated must be understood to be the only consideration, so that proof of any other consideration would contradict the deed (*n*).

§ 1139. Parol evidence will be admitted in a suit for rescission or rectification to contradict or vary a writing, where, by some *mistake in fact* (*o*), it speaks a different language from what the parties intended; and where, consequently, it would be unconscientious or unjust to enforce it against either party according to its expressed terms. In all cases, however, of this kind, the party seeking relief undertakes a task of great difficulty, since the court will not interfere, unless it be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really exists, and next, that it is such a mistake as ought to be corrected (*p*). A plaintiff may seek this equitable relief by commencing an action, either to reform the writing —in which event it will be necessary, except under very special circumstances (*q*), and except when he establishes fraud or misrepresentation amounting to fraud on the part of the defendant (*r*), to

(*l*) 2 Ph. Ev. 353; *Tull* v. *Parlett*, (1829) M. & M. 472; 31 R. R. 751, per Tindal, C. J.

(*m*) *Kelson* v. *Kelson*, (1853) 10 Hare 385.

(*n*) *Frith* v. *Frith*, [1906] A. C. at p. 258; 75 L. J. P. C. 50; approving *Clifford* v. *Turrell*, (1841) 1 Y. & C. C. C. 138; 14 L. J. Ch. 390; 57 R. R. 275. It is thought that the rule as stated in these authorities must be taken to prevail over the earlier cases which formerly laid down the contrary. See *Peacock* v. *Monk*, (1748) 1 Ves. sen. 128; cited by Alderson, B., in *Gale* v. *Williamson*, (1841) 8 M. & W. 408; 10 L. J. Ex. 446; 58 R. R. 749. As to instruments not under seal, see *In re Barnstaple Second Annuity Society*, (1884) 50 L. T. 424. See also *Filmer* v. *Gott*, (1774) 7 Bro. P. C. 70; cited in *R.* v. *Scammonden*, (1789) 3 T. R. 475; 1 R. R. 752; *Pott* v. *Todhunter*, (1845) 2 Coll. 76.

(*o*) See *Hunt* v. *Rousmanier*, (1823) 8 Wheat. 211, *et seq.*; *Price* v. *Ley*, (1863) 4 Giff. 235; 32 L. J. Ch. 530; 141 R. R. 186.

(*p*) *M. of Townsend* v. *Strangroom*, (1801) 6 Ves. 339; *Mortimer* v. *Shortall*, (1842) 2 Dr. & War. 371; 59 R. R. 730; *Bold* v. *Hutchinson*, (1855) 5 De Gex, M. & G. 558; 25 L. J. Ch. 508; 104 R. R. 196; *Wright* v. *Goff*, (1856) 22 Beav. 207, 214; 25 L. J. Ch. 813; 111 R. R. 330; *Ashhurst* v. *Mill*, (1848) 7 Hare 502; 18 L. J. Ch. 129, 133; 82 R. R. 214; *Gillespie* v. *Moon*, (1817) 2 Johns 585; *MacCormack* v. *MacCormack*, (1876) 1 L. R. Ir. 119; *Welman* v. *Welman*, (1880) 15 Ch. D. 570.

(*q*) *Lovesy* v. *Smith*, (1880) 15 Ch. D. 655; 49 L. J. Ch. 800.

(*r*) *May* v. *Platt*, [1900] 1 Ch. 616; 69 L. J. Ch. 357.

satisfy the court that the mistake was made on both sides (*s*); or to rescind the instrument—in which case, though conclusive proof of error or surprise on the plaintiff's part alone may suffice (*t*), it must appear that the mistake was one of vital importance (*u*). In either of these cases, if the defendant denies the case as set up by the plaintiff, and the latter simply relies on the verbal testimony of witnesses, and has no documentary evidence to adduce—such, for instance, as a rough draft of the agreement, the written instructions for preparing it, or the like—the plaintiff's position will be well-nigh desperate; though even here, as it seems, the parol evidence may be so conclusive in its character as to justify the court in granting the relief prayed (*v*).

§ 1140. A defendant, also, against whom a specific performance of a written agreement is sought, may insist upon the mistake, and may establish its existence by parol evidence, because he may rely on any matter which shows it to be inequitable to enforce the contract (*x*). But here an artificial distinction must be noticed, which has been recognised as undoubted law in the British Courts, and which is this: that though parol evidence may be received against a plaintiff seeking a specific performance, it will be inadmissible in his favour; or, in other words, the courts will not receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution (*y*). The authorities for this doctrine, before

(*s*) *Mortimer* v. *Shortall*, *supra*; *Murray* v. *Parker*, (1854) 19 Beav. 305; 105 R. R. 153; *Rooke* v. *Ld. Kensington*, (1856) 2 K. & J. 753; 25 L. J. Ch. 795; 110 R. R. 456; *Bentley* v. *Mackay*, (1862) 4 De G. F. & J. 279; 135 R. R. 145; *Sells* v. *Sells*, (1860) 29 L. J. Ch. 500; 1 Dr. & Sm. 42; *Fowler* v. *Fowler*, (1859) 4 De G. & J. 250; 124 R. R. 234; *Elwes* v. *Elwes*, (1861) 3 De G. F. & J. 667; 130 R. R. 289; *Bradford* v. *Romney*, (1862) 30 Beav. 431, 438; 132 R. R. 342; *Gray* v. *Boswell*, (1862) 13 Ir. Ch. R. 77; *Fallon* v. *Robins*, (1865) 16 *id.* 422. See *Bloomer* v. *Spittle*, (1872) L. R. 13 Eq. 427; 41 L. J. Ch. 369.

(*t*) *Mortimer* v. *Shortall*, *supra*; *Murray* v. *Parker*, *supra*; *Rooke* v. *Ld. Kensington*, *supra*; *Bentley* v. *Mackay*, *supra*; *Sells* v. *Sells*, *supra*; *Fowler* v. *Fowler*, *supra*; *Elwes* v. *Elwes*, *supra*; *Bradford* v. *Romney*, *supra*; *Gray* v. *Boswell*, *supra*; *Fallon* v. *Robins*, *supra*. See *Harris* v. *Pepperell*, (1867) 5 Eq. 1.

(*u*) Story, Eq. Jur. § 144, n.

(*v*) *Mortimer* v. *Shortall*, *supra*; *Alexander* v. *Crosbie*, (1835) Lloyd & G. 150; 46 R. R. 183; *M. of Townsend* v. *Strangroom*, (1801) 6 Ves. 339; 5 R. R. 312; *Gillespie* v. *Moon*, *supra*; *Lovesy* v. *Smith*, *supra*.

(*x*) 1 Story, Eq. Jur. § 161; 2 *id.* § 770; *M. of Townsend* v. *Strangroom*, *supra*; *Davies* v. *Fitton*, (1842) 2 Dr. & W. 232; 90 R. R. 885; *Wood* v. *Scarth*, (1855) 2 K. & J. 33; 110 R. R. 88; *Webster* v. *Cecil*, (1861) 30 Beav. 62; 132 R. R. 185; *Manser* v. *Back*, (1848) 6 Hare 443; 77 R. R. 187; *Howard* v. *Wright*, (1823) 2 Coop. 114; 1 L. J. (O.S.) Ch. 94; 24 R. R. 169; *Squire* v. *Campbell*, (1836) *id.* 114; 6 L. J. Ch. 41; 43 R. R. 231. See *Carpenter* v. *Providence Washington Ins. Co.*, (1846) 4 Howard S. Ct. R. 222 (Am.).

(*y*) *Davies* v. *Fitton*, *supra*; *M. of Townsend* v. *Strangroom*, *supra*; *Woolam* v. *Hearne*, (1802) 7 Ves. 211; 6 R. R. 113; *Higginson* v. *Clowes*, (1808) 15 Ves. 516; 10 R. R. 112; *Clowes* v. *Higginson*, (1813) 1 V. & B. 375; 12 R. R. 284; *Rich* v. *Jackson*, (1794) 4 Br. C. C. 514; *Clinan* v. *Cooke*, (1802) 1 Sch. & Lef. 38; 9 R. R. 3; *Att.-Gen.* v. *Sitwell*, (1835) 1 Y. & C. 559, 583; *Squire* v. *Campbell*, *supra*. See, however, *M'Cormack* v. *M'Cormack*, (1876) 1 L. R. Ir. 119; *Gun* v. *McCarthy*, (1884) 13 L. R. Ir. 304.

the Judicature Act, were not entirely uniform (*yy*), whilst in America it was emphatically challenged by Chancellor Kent (*z*) and Mr. Justice Story (*a*). Since the Judicature Act, 1873 (see sec. 24, sub-sec. 7), two actions have been entertained for the reformation of contracts, and for the specific performance of such reformed contracts in cases in which the Statute of Frauds did not create a bar (*aa*). But Notwithstanding these cases the question whether the doctrine has survived the Judicature Act must apparentely be regarded as still controversial (*aaa*).

§ 1141 (*b*). The rule under discussion does not exclude verbal evidence, when adduced to prove that the written agreement has been totally waived or discharged. If, indeed, the agreement be by deed, it can only be entirely, or even partially, dissolved by an instrument of an equally solemn character; for the maxim of law is well established, that unumquodque ligamen dissolvitur eodem ligamine quo et ligatur (*c*). Therefore, where to an action of covenant for non-payment of money, the defendant pleaded a parol discharge in satisfaction of all demands, the court held, upon demurrer, that the covenant could not be discharged without a deed (*d*). A similar decision was pronounced at law on a rule obtained by the plaintiff for judgment non obstante veredicto, in a case where an action had been brought by a landlord against his tenant, on a covenant by the latter to yield up, at the expiration of the term, all erections set up during the tenancy; the defendant having obtained a verdict on a plea stating an agreement between the parties, that, if the defendant built a greenhouse on the premises, he should be at liberty to remove it (*e*). But since the Judicature Acts the rights of the parties

(*yy*) See Fry on Specific Performance, 5th ed., § 816.

(*z*) *Keisselbrack* v. *Livingstone*, (1819) 4 Johns. 144, 148, 149.

(*a*) 1 Story, Eq. Jur. § 161, and n. Those who require further information on this subject are referred to Sug. V. & P. 124-128; 1 Story, Eq. Jur. §§ 152—161; Gresl. Ev. 205—209. Fry on Specific Performance, 5th ed., §§ 814—818.

(*aa*) *Olley* v. *Fisher*, (1886) 34 C. D. 367; 56 L. J. Ch. 208 (North, J.), and *Shrewsbury and Talbot Cab, &c., Co.* v. *Shaw*, (1890) 89 Law Times Jo. 274 (Kay, J.).

(*aaa*) See *May* v. *Platt*, [1900] 1 Ch. 616, at pp. 621, 622; 69 L. J. Ch. 357; (Farwell, J.); *Thompson* v. *Hickman*, [1907] 1 Ch. 550; 76 L. J. Ch. 254 (Neville, J.).

(*b*) Gr. Ev. § 302, in part, as to first five lines.

(*c*) 2 Inst. 360; Wing. Max. 68—72; Story, Agen, § 49; *Fowell* v. *Forrest*, (1669) 2 Wms. Saund. 47ff, 47gg; *Harris* v. *Goodwyn*, (1841) 2 Man. and G. 405; 10 L. J. C. P. 62; *Doe* v. *Gladwin*, (1845) 6 Q. B. 953, 962; 14 L. J. Q. B. 189; 66 R. R. 611; *Rawlinson* v. *Clarke*, (1845) 14 M. & W. 187, 192; 14 L. J. Ex. 364.

(*d*) *Rogers* v. *Payne*, (1768) 2 Wils. 376, recognised in *West* v. *Blakeway*, (1841) 2 Man. & G. 751; 10 L. J. C. P. 173; 58 R. R. 563; *Cordwent* v. *Hunt*, (1818) 8 Taunt. 596; 20 R. R. 578. See *Spence* v. *Healey*, (1853) 8 Ex. 668; 22 L. J. Ex. 249; 91 R. R. 696; *May, of Berwick* v. *Oswald*, (1853) 1 E. & B. 295; 22 L. J. Q. B. 129; 93 R. R. 141; *Thames Iron Works Co.* v. *Royal Mail St. Packet Co.*, (1862) 13 C. B. (N.S.) 358; 31 L. J. C. P. 169; 134 R. R. 569.

(*e*) *West* v. *Blakeway*, *supra*. But see *Cort* v. *Ambergate, &c., Ry.*, (1851) 17 Q. B. 127, 145, 146; 20 L. J. Q. B. 460; 85 R. R. 369.

would have to be adjusted upon the principles, which, previous to those Acts, would have been applied by courts of equity (*f*). It used to be regarded, at common law, as an indifferent matter, whether the agreement in discharge of the deed were in writing or merely verbal, or whether it were executory or executed; and, therefore, if an act was required by deed to be done within a certain time, evidence could not be given to show that the period was extended by some instrument not under seal, and that the act was performed within the time so extended (*g*). In this latter event, however, the courts would perhaps on equitable grounds now grant relief (*h*); at least, if it could be shown that the licence to extend the time was founded on some good consideration (*i*).

§ 1142. As the doctrine just stated has nothing to do with the general rule under discussion, but rests entirely on the solemn nature of deeds, any obligation by writing, which is not under seal, may, in the absence of statutory interference, be either totally or partially dissolved before breach, by a subsequent oral agreement; or, to adopt the language of Lord Denman in *Goss* v. *Lord Nugent* (*k*), "After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what will be thus left of the written agreement."

§ 1143. With respect to those cases where a writing is by statute made necessary to the validity of an agreement, the rule is different. Contracts which fall within section 4 of the Statute of Frauds or the 4th section of the Sale of Goods Act, may be wholly waived or abandoned by a subsequent oral agreement, so as to prevent either

(*f*) For the significance of this general warning, reference may be made to *Hurst* v. *Picture Theatres, Ld.*, [1915] 1 K. B. 1; 83 L. J. K. B. 1837.

(*g*) *Gwynne* v. *Davy*, (1840) 1 Man. & G. 857, 871; 56 R. R. 548; *Littler* v. *Holland*, (1790) 3 T. R. 590. See *Nash* v. *Armstrong*, (1861) 30 L. J. C. P. 286; 10 C. B. (N.S.) 259; 128 R. R. 702. See, also, *Williams* v. *Stern*, (1879) 5 Q. B. D. 409; 49 L. J. Q. B. 663, questioning *Albert* v. *Grosvenor Invest. Co.*, (1867) L. R. 3 Q. B. 123; 37 L. J. Q. B. 24.

(*h*) *Gwynne* v. *Davy*, *supra.*

(*i*) *Williams* v. *Stern*, *supra.*

(*k*) (1833) 5 B. & Ad. 65; 2 L. J. K. B. 127; 39 R. R. 392. By the law of Scotland, no written obligation whatever can be extinguished or renounced, without either the creditor's oath, or a writing signed by him. Tait, Ev. 325. Neither can a written agreement be afterwards waived or varied by mere words; though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose; *Bargaddie Coal Co.* v. *Wark*, (1859) 3 Macq. H. L. 467.

party from recovering on the original written contract, for the Acts referred to do not expressly require that the contracts in question must be in writing, but merely enact that, unless they are so, no action shall be brought upon them (*l*). No general rule can with safety be laid down respecting the validity of the oral dissolution of a statutory instrument; but, in each case, the special language of the Act requiring the writing must be duly considered; and in several cases, as, for instance, in that of a will, it is clear law that a verbal abandonment will not suffice (*m*).

§ 1144. But whatever may be the effect of an oral dissolution of the entire statutory contract, thus much is certain, that no verbal agreement to abandon it in part, or to add to, or modify, its terms, can be received; for to allow such contracts to be proved partly by writing, and partly by oral testimony, would be to let in all the mischiefs which it was the object of the Legislature to exclude and here it matters not what term of the written contract is sought to be varied by parol, since no distinction can be drawn between the material and immaterial parts of the contract; but everything which originally formed part of the agreement, in regard to which the parties are stipulating, must be deemed to be material (*n*). The question is whether there is an intention in any event to rescind the first contract, independent of any further intention that may exist to substitute a second contract. What is essential is that there should be manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting (*o*).

§ 1145 If, then, a written contract is made for the sale, either

(*l*) *Goss* v. *Ld. Nugent*, *supra*; *Morris* v. *Baron*, [1918] A. C. 1; 87 L. J. K. B. 145. The rescinding contract may be expressed or implied. Ib.; *Price* v. *Dyer*, (1810) 17 Ves. 356; 11 R. R. 102. These dicta go far towards overruling a contrary opinion expressed by Ld. Hardwicke in *Buckhouse* v. *Crossby*, (1737) 2 Eq. Cas. Ab. 32, pl. 44, and in *Bell* v. *Howard*, (1741) 9 Mod. 305.

(*m*) *Ante*, § 1063.

(*n*) *Marshall* v. *Lynn*, (1840) 6 M. & W. 116; 9 L. J. Ex. 126; 55 R. R. 534; *Emmet* v. *Dewhirst*, (1852) 21 L. J. Ch. 497; *Moore* v. *Campbell*, (1854) 10 Ex. 323; 23 L. J. Ex. 310; 102 R. R. 604; *Sanderson* v. *Graves*, (1875) L. R. 10 Ex. 234; *Vazey* v. *Rashleigh*, [1904] 1 Ch. 634; 73 L. J. Ch. 422; 44 L. J. Ex. 210; in *Williams* v. *Moss's Empires*, *Lim.*, [1915] 3 K. B. 242; 84 L. J. K. B. 1767. There was an agreement of service in writing for 3½ years (consequently within the Statute of Frauds as not to be performed within a year). When less than a year remained to complete the period of service, the mode of remuneration was altered by parol. It was held by the Divisional Court, that the parol alteration could be given effect to, the agreement, as altered, being no longer within the Statute of Frauds. But in *Morris* v. *Baron*, *supra*, the House of Lords dissented from the view of the law upon which the decision was based, and it is thought that the decision itself must be regarded as overruled by the last-mentioned case.

(*o*) Per Lord Haldane in *Morris* v. *Baron*, *supra*, at pp. 18, 19.

of goods above the value of £10, or of lands, and the writing states a time for the delivery of the goods, or for the completion of the purchase, no verbal agreement to substitute another day for the one originally agreed upon will be valid (*p*), but the original contract may still be enforced in its entirety (*q*). So, where a vendor had contracted in writing to sell to a purchaser certain lots of land, and to make out a good title to them, the court held, that, in an action for the purchase-money, he was not at liberty to show a verbal waiver by the purchaser of his right to a good title as to one lot; since the effect of such a waiver was to substitute a partly oral contract for the one, which the Statute of Frauds required to be in writing (*r*). So, where a master had agreed by letter to pay his clerk a yearly salary, and the contract was necessarily in writing, being one which would not be performed within a year from its date, parol evidence was held to be inadmissible, when tendered to show either a contemporaneous, or a subsequent, verbal agreement that the salary should be paid quarterly, or to prove the fact that quarterly payments had usually been made (*s*). Again, if an entire written agreement consists of divers particulars, some of which are within, and others without, the operation of the Statute of Frauds, a verbal agreement to vary the latter part in even some trifling particular, as, for instance, to have one valuer instead of two, cannot be received in evidence, though that part of the contract might, of itself, have been good without any writing (*t*). An oral agreement may be a contract for the sale of goods within section 4 of the Sale of Goods Act, not the less because it deals also with matters other than the sale of goods (*u*).

§ 1146. In applying this doctrine to testamentary instruments, care must be taken to mark the distinction between the revocation

(*p*) *Stowell* v. *Robinson*, (1837) 3 Bing. N. C. 928; 6 L. J. C. P. 326; 43 R. R. 861; *Marshall* v. *Lynn*, *supra*; *Stead* v. *Dawber*, (1839) 10 A. & E. 57; 9 L. J. Q. B. 101; 50 R. R. 327; *Tyers* v. *Rosedale and Ferryhill Iron Co.*, (1875) L. R. 10 Ex. 195; 44 L. J. Ex. 130. These cases overrule *Cuff* v. *Penn*, (1813) 1 M. & S. 21; 14 R. R. 384; *Warren* v. *Stagg*, (1787) cited in *Littler* v. *Holland*, (1790) 3 T. R. 591; and *Thresh* v. *Rake*, (1794) 1 Esp. 53. See *Ogle* v. *Ld. Vane*, (1868) L. R. 3 Q. B. 272; 37 L. J. Q. B. 77.

(*q*) *Noble* v. *Ward*, (1867) L. R. 2 Ex. 135; 36 L. J. Ex. 91. See, also, *Leather Cloth Co.* v. *Hieronimus*, (1875) L. R. 10 Q. B. 140; 44 L. J. Q. B. 54; *Hickman* v. *Haynes*, (1875) L. R. 10 C. P. 598; 44 L. J. C. P. 358; *Plevins* v. *Downing*, (1876) 1 C. P. D. 220; 45 L. J. C. P. 695.

(*r*) *Goss* v. *Ld. Nugent*, (1833) 5 B. & Ad. 58; 2 L. J. K. B. 127; 39 R. R. 392.

(*s*) *Giraud* v. *Richmond*, (1846) 2 C. B. 835; 15 L. J. C. P. 180; 69 R. R. 620; *Evans* v. *Roe*, (1872) L. R. 7 C. P. 138.

(*t*) *Harvey* v. *Grabham*, (1836) 5 A. & E. 61, 74; 5 L. J. K. B. 235; 44 R. R 374.

(*u*) *Morris* v. *Baron*, *supra*, in which case the oral agreement in question, in addition to the sale of goods, contained terms of compromise of litigation between the parties; and in subsequent litigation relating to the sale of goods it was held to be a contract within section 4 of the Sale of Goods Act.

of a will, and the ademption, or, rather, the payment by anticipation, of a legacy; for although a will can be neither wholly nor partly revoked or abandoned by words, parol evidence is admissible to establish either a total or a partial ademption of a legacy, by which term the law means, that the subject-matter of the legacy has been aliened by the testator in his lifetime (*v*). Thus, where a testator bequeathed £3,000 to his daughter for her separate use for life, with remainder to her children, and gave the residue of his property to his son, it was held by Vice-Chancellor Wigram, in a suit by the children of the daughter against the son, claiming to have the legacy invested and secured for their benefit, that the defendant might show by extrinsic parol evidence that, after the date of the will, the testator, at his daughter's request, had paid her husband £500, and had then declared that this sum was to be considered in part satisfaction of the legacy; and that he had expressed his determination not to alter his will, having been advised by his solicitor that it was unnecessary to do so (*x*). It will be seen that the evidence here admitted did not in any way revoke or alter the will, but simply proved a transaction, whereby the daughter had in part received her legacy by anticipation; and the declarations of the testator, being contemporaneous with the advance of the money, were rightly considered as part of that transaction.

§ 1147. It is almost superfluous to observe, that the rule is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter (*y*). For instance, the fact that a written demise of an unfinished house has been duly signed, will not preclude the tenant from proving that at the time of the demise the landlord verbally agreed with him to put the premises into a habitable state (*z*). Nor will the fact of a lease or agreement having been signed preclude parol evidence of a collateral warranty that the drains are in good condition (*a*), the lease or agreement being silent on the subject of drainage (*b*). Where parties have agreed for the lease of a house to be built upon land at a cost of £400, a collateral agreement that if the cost exceeded £400 the rent should be proportionate to the expenditure has been held to be admissible (*c*).

(*v*) *Harrison* v. *Jackson*, (1877) 7 Ch. D. 339, 341; 47 L. J. Ch. 142.

(*x*) *Kirk* v. *Eddowes*, (1844) 3 Hare, 509; 13 L. J. Ch. 402; 64 R. R. 390; *Ferris* v. *Goodburn*, (1858) 27 L. J. Ch. 574; 114 R. R. 556. See *Nevin* v. *Drysdale*, (1867) 36 L. J. Ch. 662.

(*y*) See *ante*, § 1135.

(*z*) *Mann* v. *Nunn*, (1874) 43 L. J. C. P. 241; *Angell* v. *Duke*, (1875) 44 L. J. Q. B. 78.

(*a*) *De Lassale* v. *Guildford*, [1901] 2 K. B. 215; 70 L. J. K. B. 533.

(*b*) *Lloyd* v. *Sturgeon Falls Pump Co.*, (1901) 85 L. T. 162.

(*c*) *Williams* v. *Jones*, (1887) 36 W. R. 573.

Letters which have passed during negotiations which have terminated in a written agreement, are admissible to support a collateral verbal agreement set up by one of the parties (*d*). So where parties to an indenture of charter-party afterwards agreed by parol to use the ship for a period which was to elapse before the charter-party attached, it was held that this latter contract might be enforced by action (*e*). It would even seem, that, if money be received by a party, under circumstances raising an implied promise to pay it to another, or under an express promise so to do, and subsequently a deed be entered into between these parties in order to ascertain the amount to be paid, an action of simple contract can be sustained (*f*). But if a debt be secured by deed, the mere subsequent statement of an account respecting it will not justify the creditor in bringing an action on an account stated, but he must still declare on the specialty, as the striking of a balance under these circumstances creates no new liability (*g*).

§ 1148 (*h*). Next, the rule does not restrict the court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, all contemporaneous writings relating to the same subject-matter, are admissible in evidence, provided only that they be of equal solemnity with the principal document, and that no oral testimony be required for the purpose of connecting them therewith (*i*).

§ 1149 (*k*). It may further be remarked, that the rule is applied only in suits between the parties to the instrument, and their representatives; and they alone are to blame if the writing contains what was not intended, or omits what it should have contained. It cannot affect third persons; who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and,

(*d*) *Pearson* v. *Pearson*, (1884) 27 Ch. D. 149; 54 L. J. Ch. 32.

(*e*) *White* v. *Parkin*, (1810) 12 East, 578; 11 R. R. 488. See *Seago* v *Deane*, (1828) 4 Bing. 459; 6 L. J. (O.S.) C. P. 66; 29 R. R. 599; *Fletcher* v. *Gillespie*, (1826) 3 Bing. 635; 4 L. J. C. P. 202; *Foster* v. *Allanson*, (1788) 2 T. R. 479.

(*f*) *Edwards* v. *Bates*, (1844) 7 Man. & G. 600; 13 L. J. C. P. 156.

(*g*) *Middleditch* v. *Ellis*, (1848) 2 Ex. 623; 17 L. J. Ex. 365.

(*h*) Gr. Ev. § 283, in part.

(*i*) *Leeds* v. *Lancashire*, (1809) 2 Camp. 205; *Hartley* v. *Wilkinson*, (1815) 4 Camp. 127; *Stone* v. *Metcalf*, (1815) 1 Stark. 53; *Bowerbank* v. *Monteiro*, (1813) 4 Taunt. 846; 14 R. R. 679; *Gale* v. *Williamson*, (1841) 8 M. & W. 405; 10 L. J. Ex. 446; 58 R. R. 749; *Brown* v. *Langley*, (1842) 4 Man. & G. 466, 470; 12 L. J. C. P. 62; 61 R. R. 561; *Peek* v. *N. Staffordshire Ry.*, (1858) 27 L. J. Q. B. 465; 113 R. R. 964; E. B. & E. 958; *Hunt* v. *Livermore*, (1827) 5 Pick. 395; *Davlin* v. *Hill*, (1834) 2 Fairf. 434; *Couch* v. *Meeker*, (1817) 2 Conn. 302; *Lee* v. *Dick*, (1836) 10 Pet. 482; *Bell* v. *Bruen*, (1843) 17 Pet. 161; ante, § 1026.

(*k*) Gr. Ev. § 279, as to first nine lines.

who, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others (*l*). Thus, in a settlement case, where the value of an estate upon which the validity of the settlement rested was in question, evidence of a greater sum having been paid for it than was recited in the purchase deed was held admissible (*m*). So, in a similar case, parol evidence has been received to show that lands, described in a deed of conveyance as in one parish, were in fact situated in another (*n*). So, also, to show that, at the time of entering into a contract of service in a particular employment, a further agreement was made to pay a sum of money as a premium for teaching the pauper the trade, whereby an apprenticeship was intended; and that the whole was therefore void for want of a stamp, and so no settlement was gained (*o*). In another pauper case, where an unstamped assignment of a parish apprentice stated that the new master, in consideration of £3 paid him by the old master, agreed to accept the apprentice, &c., parol evidence that the money was in fact paid, not by the old master, but by the parish officer, was admitted for the purpose of showing that the instrument did not require a stamp (*p*).

§ 1150. Some of the cases cited in the last section seem to have been determined, not only on the ground that the contending parties were strangers to the deed, but on the principle that, though parol evidence is inadmissible to contradict a written agreement, it may be offered to ascertain an independent collateral fact explanatory of the instrument (*q*). Indeed, it appears that the rule will not be infringed by adducing extrinsic evidence even to contradict a deed or other writing, provided the contradiction be confined to the recitals of formal matter, which may well be presumed not to have been stated with careful precision (*r*). For instance, parol evidence has, on several occasions, been admitted, to contradict the recited date of a deed, order, or other instrument; as by proving that a charter-party, dated February the 6th, conditioned to sail on or before February the 12th, was not executed till after the latter day, and that therefore the condition was dispensed with (*s*); or by

(*l*) *R.* v. *Cheadle*, (1832) 3 B. & Ad. 838; 1 L. J. M. C. 75.

(*m*) *R.* v. *Scammonden*, (1789) 3 T. R. 474; 1 R. R. 752; *R.* v. *Olney*, (1813) 1 M. & Sel. 387; *R.* v. *Cheadle*, *supra*.

(*n*) *R.* v. *Wickham*, (1835) 3 A. & E. 517.

(*o*) *R.* v. *Laindon*, (1789) 8 T. R. 379.

(*p*) *R.* v. *Llangunnor*, (1831) 2 B. & Ad. 616; 9 L. J. (O.S.) M. C. 90

(*q*) *R.* v. *Stoke-upon-Trent*, (1843) 5 Q. B. 308; 13 L. J. M. C. 41; *Summers* v. *Moorhouse*, (1884) 13 Q. B. D. 388.

(*r*) 3 St. Ev. 787, 788; 2 Poth., Obl. 181, 182.

(*s*) *Hall* v. *Cazenove*, (1804) 4 East, 477; 7 R. R. 611. See *Steele* v. *Mart*, (1825) 4 B. & C. 273; 28 R. R. 256; *Cooper* v. *Robinson*, (1842) 10 M. & W. 694; 12 L. J. Ex. 48; 62 R. R. 726.

showing, in answer to an objection that a notice of appeal was given too late, that the order, though bearing date the 24th of June, was in fact not signed by the justices till three days afterwards (*t*). In the case of *Reffell* v. *Reffell* (*u*), the Court of Probate admitted parol evidence to prove that a will bearing date the 27th February, 1855, was in fact executed in 1865, and had consequently revoked another will that was made in 1858.

§ 1151. Having now, by a series of negative propositions, pointed out the several classes of cases to which the rule under consideration does not extend, it will be expedient to advert shortly to some of the leading cases, in which the rule has been actually applied, and parol evidence has been rejected (*v*). The reason and policy of the rule will thus best be seen, as well as its nature and extent. For example (*x*), where a policy of insurance was affected on goods "in ship or ships from Surinam to London," parol evidence was held inadmissible to show, that a particular ship, which was lost, had been verbally excepted at the time of the contract (*y*). So, where a policy described the two termini of the voyage, the insurers were not allowed to prove by parol evidence, that the risk was not to commence till the vessel reached an intermediate place (*z*). So, where the instrument purported to be an absolute engagement to pay on a specified day, parol evidence of a contemporaneous oral agreement, that the payment should be hastened or postponed (*a*), or depend upon a contingency (*b*), or be made out of a particular fund only (*c*), or that a bill of exchange should be renewed on maturity (*d*) has been rejected; and where goods were sold under

(*t*) *R.* v. *Flintshire*, (1846) 3 Dowl. & L. 537; 15 L. J. M. C. 50, per Williams, J.

(*u*) 35 L. J. P. & M. 121; (1866) L. R. 1 P. & D. 139.

(*v*) See *Fawkes* v. *Lamb*, (1862) 31 L. J. Q. B. 98.

(*x*) Gr. Ev. § 281, in part.

(*y*) *Weston* v. *Emes*, (1808) 1 Taunt. 115.

(*z*) *Kaines* v. *Knightley*, (1682) Skin. 54; *Leslie* v. *De la Torre*, (1795) cited 12 East, 583.

(*a*) *Hoare* v. *Graham*, (1811) 3 Camp. 57; 13 R. R. 752; *Spartali* v. *Benecke*, (1850) 10 C. B. 212; 19 L. J. C. P. 293; 84 R. R. 532; as explained by Williams, J., in *Field* v. *Lelean*, (1861) 30 L. J. Ex. 170; 6 H. & N. 627, 628; 123 R. R. 729; *Besant* v. *Cross*, (1851) 10 C. B. 895; 20 L. J. C. P. 173; *Hanson* v. *Stetson*, (1827) 5 Pick. 506; *Spring* v. *Lovett*, (1831) 11 Pick. 417.

(*b*) *Abrey* v. *Crux*, (1869) L. R. 5 C. P. 37; 39 L. J. C. P. 9; *M'Dougall* v *Field*, (1872) I. R. 6 C. L. 185; *Rawson* v. *Walker*, (1816) 1 Stark. 361; *Adams* v. *Wordley*, (1836) 1 M. & W. 374; *Foster* v. *Jolly*, (1835) 1 Cr. M. & R. 703; 4 L. J. Ex. 65; 40 R. R. 685; *Free* v. *Hawkins*, (1817) 8 Taunt. 92; *Woodbridge* v. *Spooner*, (1819) 3 B. & Ald. 233; 22 R. R. 365; *Stott* v. *Fairlamb*, (1833) 52 L. J. Q. B. 420; *Moseley* v. *Hanford*, (1830) 10 B. & C. 729; 8 L. J. (O.S.) K. B. 261; *Erwin* v. *Saunders*, (1823) 1 Cowen, 249; *Hunt* v. *Adams*, (1811) 7 Mass. 518. See *Salmon* v. *Webb*, (1852) 3 H. L. C. 510; 88 R. R. 182.

(*c*) *Campbell* v. *Hodgson*, (1819) Gow N. P. 74.

(*d*) *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487; 67 L. J. Q. B. 825. See also *Henderson* v. *Arthur*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; *Hitchings* v. *Northern Leather Co.*, [1914] 3 K. B. 907; 83 L. J. K. B. 1819.

a written contract, which was silent as to the time when they were to be taken away and payment was to be made, parol evidence was held inadmissible to prove, either that the goods were to be removed by the purchaser immediately (*e*), or that they were sold on a credit of six months (*f*).

§ 1152. Again, where a written agreement of partnership was unlimited as to the time of commencement, parol evidence, that it was at the same time verbally agreed that the partnership should not commence till a future day, was held inadmissible (*g*). So, in an action for use and occupation, upon a written memorandum of lease at a certain rent, parol evidence has been rejected of a contemporaneous verbal agreement to pay a further sum, being the ground-rent of the premises, to the ground-landlord (*h*). So, where a ship was particularly described in a written contract of sale, parol evidence of a further descriptive representation, made prior to the sale, was held inadmissible to charge the vendor, without proof of actual fraud; all previous conversation being merged in the written contract (*i*). Evidence of a promise by a lessee to work a certain quantity of the subject of a mining lease is inadmissible (*k*). Evidence that the grantee's name in a deed is a mistake is also inadmissible (*l*); and where a deed conveyed the messuage and land called Gotton Farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule, had always been occupied and treated as part of Gotton Farm, was rejected (*m*).

§ 1153. Where land let for years had,—prior to the passing of the Apportionment Act, 1870 (*n*),—been sold by the lessor, a con-

(*e*) *Greaves* v. *Ashlin*, (1813) 3 Camp. 426; 14 R. R. 771. See, also, *Harnor* v. *Groves*, (1855) 15 C. B. 667; 24 L. J. C. P. 53; 100 R. R. 535.

(*f*) *Ford* v. *Yates*, (1844) 2 Man. & G. 549; 10 L. J. C. P. 117; 58 R. R. 471. In that case the court erroneously assumed, that the memorandum, which really contained the name of only one of the parties, was sufficient to satisfy the Statute of Frauds; and on such assumption the decision was correct. See *Lockett* v. *Nicklin*, (1848) 2 Ex. 98—100, cited *ante*, § 1134.

(*g*) *Dix* v. *Otis*, (1827) 5 Pick. 38 (Am.).

(*h*) *Preston* v. *Merceau*, (1775) 2 W. Bl. 1249. See *The Isabella*, (1799) 2 C. Rob. 241; *White* v. *Wilson*, (1800) 2 Bos. & P. 116; *Rich* v. *Jackson*, (1794) 4 Bro. C. C. 514; *Brigham* v. *Rogers*, (1822) 17 Mass. 571.

(*i*) *Pickering* v. *Dowson*, (1813) 4 Taunt. 779. See, also, *Stucley* v. *Baily*, (1862) 1 H. & C. 405; 31 L. J. Ex. 483; 130 R. R. 588; *Powell* v. *Edmunds*, (1810) 12 East, 6; 11 R. R. 316; *Pender* v. *Fobes*, (1838) 1 Dev. & B. 250; *Wright* v. *Crookes*, (1840) 1 Scott, N. R. 685; 56 R. R. 587.

(*k*) *Lyn* v. *Miller*, (1855) 24 Pa. St. 392; and other American cases cited in Greenleaf on Evidence (15th ed.) note to § 281.

(*l*) *Crawford* v. *Spencer*, (1851) 62 Mass. 418.

(*m*) *Barton* v. *Dawes*, (1850) 10 C. B. 261; 19 L. J. C. P. 302; 84 R. R. 562; *Llewellyn* v. *Ld. Jersey*, (1843) 11 M. & W. 183; 12 L. J. Ex. 243; 63 R. R. 569. See *post*, §§ 1224, 1225.

(*n*) 33 & 34 V. c. 35.

temporaneous parol agreement, that the current quarter's rent should be apportioned between the vendor and purchaser, was held to be inadmissible (*o*). So, when a promissory note was in its terms joint, it was supposed that evidence could not be given that one of the makers was merely a surety, and that the payee had given time to the principal (*p*). This doctrine, however, has now been held inapplicable to a case, where a money-lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety (*q*). In such a case the surety, notwithstanding the form of the note, may plead and prove, that he was known by the lender to be a surety when the note was made, and that, without his consent, the principal has had time given to him by the lender (*r*). It appears, however, still to be law that if a party signs a bill of exchange, a charter-party (*s*), or indeed, any written contract, in his own name, and there is nothing in the instrument to show that he intends merely to act on behalf of a named principal (*t*), he cannot avoid his personal liability by giving parol evidence that he merely signed as the agent of another, and that the party with whom he contracted was aware of that fact (*u*); although, if the object be on the one hand to charge with liability (*v*), or on the other to give the benefit of the contract to (*x*), the unnamed

(*o*) *Flinn* v. *Calow*, (1840) 1 Man. & G. 589.

(*p*) *Abbott* v. *Hendricks*, (1840) 1 Man. & G. 794; 10 L. J. C. P. 51; 56 R. R. 542; *Manley* v. *Boycot*, (1853) 2 E. & B. 46; 22 L. J. Q. B. 265; 92 R. R. 421; *Strong* v. *Foster*, (1855) 25 L. J. C. P. 106; 17 C. B. 201; 104 R. R. 653. See *Davies* v. *Stainbank*, (1855) 6 De G. M. & G. 679; 106 R. R. 239; *Riley* v. *Gerrish*, (1851) 9 Cush. 104; and *Myrick* v. *Daine*, (1852) *id.* 248.

(*q*) *Greenough* v. *M'Clelland*, (1861) 2 E. & E. 424; 30 L. J. Q. B. 15; 119 R. R. 778; *Mutual Loan Fund Assoc.* v. *Sudlow*, (1858) 5 C. B. (N.S.) 449; 28 L. J. C. P. 108; 117 R. R. 724; *Pooley* v. *Harradine*, (1857) 7 E. & B. 431; 26 L. J. Q. B. 156; 110 R. R. 666; *Taylor* v. *Burgess*, (1859) 5 H. & N. 1; 29 L. J. Ex. 7; 120 R. R. 441; *Lawrence* v. *Walmsley*, (1862) 31 L. J. C. P. 143; 12 C. B. (N.S.) 799; 133 R. R. 519; *Bristow* v. *Brown*, (1862) 13 Ir. C. L. R. 201; *Bailey* v. *Edwards*, (1865) 4 B. & S. 761; 34 L. J. Q. B. 41; 729 R. R. 915; *Overend, Gurney & Co.* v. *Oriental Financial Corp.*, (1874) L. R. 7 H. L. 348.

(*r*) *Id.*

(*s*) *Hough* v. *Manzanos*, (1879) 48 L. J. Ex. 398; 4 Ex. D. 104.

(*t*) *Gadd* v. *Houghton*, (1877) 46 L. J. Ex. 71; 46 L. J. Ex. 71.

(*u*) *Higgins* v. *Senior*, (1841) 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884; *Royal Exchange Assurance Co.* v. *Moore*, (1863) 2 New R. 63; *Sowerby* v. *Butcher*, (1834) 2 Cr. & M. 371; 3 L. J. Ex. 80; *Magee* v. *Atkinson*, (1837) 2 M. & W. 440; 6 L. J. Ex. 155; 46 R. R. 635; *Jones* v. *Littledale*, (1837) 6 A. & E. 486; 6 L. J. K. B. 169; 45 R. R. 542; *Stackpole* v. *Arnold*, (1814) 11 Mass. 27; *Hunt* v. *Adams*, (1811) 7 Mass. 518; *Shankland* v. *City of Washington*, (1831) 5 Pet. 394; *Lefevre* v. *Lloyd*, (1814) 5 Taunt. 749; 15 R. R. 644. But see *Holding* v. *Elliott*, (1860) 29 L. J. Ex. 134; 5 H. & N. 117; 120 R. R. 504; cited *ante*, § 804. See, also, *Williamson* v. *Barton*, (1862) 31 L. J. Ex. 170.

(*v*) *Paterson* v. *Gandasegui*, (1812) 15 East, 62; 13 R. R. 638; cited and confirmed in *Higgins* v. *Senior*, *supra*; *Calder* v. *Dobell*, (1871) L. R. 6 C. P. 486; 40 L. J. C. P. 89; *Young* v. *Schuler*, (1883) 11 Q. B. D. 671.

(*x*) *Garrett* v. *Handley*, (1825) 4 B. & C. 664; 47 R. R. 405; *Bateman* v. *Phillips*, (1812) 15 East, 272; both cited and confirmed in 8 M. & W. 844, per Parke, B.

principal, such evidence will be received; and this, too, whether the Statute of Frauds does or does not require the agreement to be in writing. The distinction between these two cases is, that in the former the parol evidence would clearly contradict the written agreement, but in the latter it would have no such effect; for without denying that the agreement was binding on the party whom it purported to bind, the evidence would merely go to show that another party, namely the principal, was also bound, on the well-known doctrine that the act of an authorised agent is, in law, the act of the principal (*y*). A contract, however, made by a person intending to contract on behalf of a third party but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal (*z*).

§ 1154. Again, though a person were to describe himself in a written contract as the agent of an unnamed principal, he might be shown to be the real principal in the event of his being sued by the party with whom he contracted (*a*). Nay, in an action brought by himself against the other contracting party, he might repudiate the character of agent and adopt that of principal; and on furnishing proof that he entered into the agreement on his own behalf, he would be entitled to recover in his own name (*b*). Where, however, an agent, who was employed to enter into a charterparty, described himself in the instrument as the owner of the ship, it was held, in an action by the principal on the charterparty, that the agent could not give parol evidence of his having acted merely as agent for the plaintiff, since such evidence would directly contradict the language contained in the written document (*c*). The description, however, in a charterparty of one of the contracting parties as "charterer" does not of itself designate him as the only person to fill that position, and does not exclude parol evidence of the charterparty having been made by him as agent for the plaintiff (*d*).

§ 1155 (*e*). Even the subsequent admission of the party as to the true intent and construction of the title-deed under which he claims, cannot be received in contradiction of the language therein con-

(*y*) *Higgins* v. *Senior*, *supra*.
(*z*) *Keighley Maxted & Co.* v. *Durant*, [1901] A. C. 240; 70 L. J. K. B. 662.
(*a*) *Carr* v. *Jackson*, (1852) 7 Ex. 382; 21 L. J. Ex. 137; 86 R. R. 699.
(*b*) *Schmeltz* v. *Avery*, (1851) 16 Q. B. 655; 20 L. J. Q. B. 228; 83 R. R. 653.
(*c*) *Humble* v. *Hunter*, (1848) 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291.
(*d*) *Drughorn Lim.* v. *R. Transatlantic*, [1919] A. C. 203; 88 L. J. K. B. 233.
(*e*) Gr. Ev. § 281, as to first three lines.

tained (*f*). Thus, where a deed purported to convey a messuage in the occupation of A., with the appurtenances, and it appeared that A. had occupied a small adjoining garden with the house, the written conditions of sale excepting the garden, and the declarations of the grantee that he had not purchased it, were held inadmissible to contradict the plain language of the deed, under which the garden had clearly passed as appurtenant to the messuage (*g*).

§ 1156. Still less will any statements made by the writer of the instrument be receivable in evidence with the view of varying its terms. Thus, where a testator devised to his eldest son his residence with the buildings to the same adjoining, and left to his second son all his other real property, declarations made by him, while giving instructions for his will, were rejected—they being tendered to show that he intended some cottages, which it was proved adjoined his residence at the time when the will was made, to pass to his second son (*h*). Again, it is well established that where, in a will, a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator (*i*); and the principle, of course, is precisely the same, whether it be the person of the devisee, or the estate or thing devised, which is left in blank (*k*).

§ 1157. The case of *Miller* v. *Travers* (*l*) furnishes an apt illustration of the rule under discussion. There the testator devised all his freehold and real estate "in the county of Limerick, and in the city of Limerick." He had no real estates in the county of Limerick, but his landed property consisted of estates in the county of Clare, which were not mentioned in the will, and a small estate in the city of Limerick, inadequate to meet the testamentary charges. Under these circumstances the court held, that the devisee could not be allowed to show by parol evidence that the estates in the county of Clare were inserted in the devise to him in the first draft of the will, which was sent to a conveyancer to make certain alterations not affecting those estates; that by mistake (*m*) he erased the words "county of Clare"; and that the testator, after keeping the will by him for some time,

(*f*) *Pain* v. *M'Intier*, (1804) 1 Mass. 69, as explained in 10 Mass. 461. See, also, *Townsend* v. *Weld*, (1811) 8 Mass. 146.

(*g*) *Doe* v. *Webster*, (1840) 12 A. & E. 442; 9 L. J. Q. B. 373; 54 R. R. 597.

(*h*) *Doe* v. *Holtom*, (1832) 4 A. & E. 76; 5 L. J. K. B. 10; 43 R. R. 310.

(*i*) *Hunt* v. *Hort*, (1791) 3 Bro. C. C. 311; *Miller* v. *Travers*, (1832) 8 Bing. 253, 254; 1 L. J. Ch. 157; 34 R. R. 703.

(*k*) *Miller* v. *Travers*, *supra*; *Taylor* v. *Richardson*, (1853) 2 Drew. 16; 23 L. J. Ch. 9; 100 R. R. 6.

(*l*) (1832) 8 Bing. 244. See, also, *In re The Clergy Society*, (1856) 2 K. & J. 615; 110 R. R. 396.

(*m*) See, also, *Francis* v. *Dichfield*, (1742) 2 Coop. 531.

executed it without adverting to the alteration as to that county. "The plaintiff," said Chief Justice Tindal, in pronouncing the joint opinion of himself, Lord Lyndhurst, and Lord Chancellor Brougham (*n*), "contends that he has a right to prove that the testator intended to pass, not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in place of, or in addition to, that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted" (*o*).

§ 1158. The language of Chief Justice Tindal just cited leads naturally to the consideration of another rule, which is this: namely, that, although extrinsic parol evidence, contradicting, varying, adding to, or subtracting from, the contents of a valid written instrument, is inadmissible; first, because the parties to the instrument must be presumed to have committed to writing all which they deemed necessary to give full expression to their meaning; and, secondly, because of the mischiefs which would result if verbal testimony were in such cases received; still, parol evidence may in all cases of doubt be adduced, to explain the written instrument; or, in other words, to enable the court to discover the meaning of the terms employed, and to apply them to the facts (*p*). Now, the "doubt" here adverted to may arise from one or both of the two following causes: either the language of the instrument may be unintelligible to the court, or, at least, be susceptible of two or more meanings; or the persons or things mentioned may require to be identified (*q*). The rule, therefore, embraces two descriptions of evidence.

§ 1159 (*r*). And first, if the characters, in which the instrument is written, are in shorthand (*s*)—or are otherwise difficult to be

(*n*) Lord Lyndhurst, C. B., and Tindal, C. J., had been summoned to assist the Ld. Chan. in this case.

(*o*) (1832) 8 Bing. 249, 250.

(*p*) *Shore* v. *Wilson*, (1842) 9 Cl. & F. 555; 57 R. R. 2, per Parke, B

(*q*) 9 Cl. & F. 555, 556, per Parke, B.; 566, 567, per Tindal, C. J.

(*r*) Gr. Ev. § 280, in part.

(*s*) See *Kell* v. *Charmer*, (1856) 23 Beav. 195; 113 R. R. 93; cited *post*, § 1196.

deciphered—or if the language, whether as being foreign, obsolete, technical, local, or provincial, is either not understood by the court, or is capable of bearing two or more interpretations—the testimony of persons skilled in deciphering writings, or who understand the language in which the instrument is written, or the ancient, technical, local, or provincial meaning of the terms employed, is admissible, to interpret the characters, or to translate the instrument, or to testify to the proper meaning of particular expressions (*t*). The first branch of this rule has been acted upon in several cases, where wills, written in a scarcely legible hand, have been interpreted by Courts of Equity, with the assistance of persons skilled in writing (*u*). The practice of proving translations of foreign documents is so notorious as to require no authority to support it; while the remainder of the rule is established beyond dispute by an absolute cloud of decisions.

§ 1160. Before adverting more particularly to these decisions, it may be well to observe, that in cases of this nature the testimony resorted to consists for the most part of evidence of usage (*v*); that is, witnesses conversant with the business, trade, or locality to which the document relates, are called to testify that, according to the recognised practice and usage of such business, trade, or locality, certain expressions contained in the writing have in similar documents a particular conventional meaning. The jury are then asked to presume that the parties, who employed these expressions, intended to use them, and did use them, in the conventional sense as explained by the witnesses (*x*).

§ 1161. In resorting to evidence of usage for the meaning of particular words in a written instrument, no distinction exists between such words as are purely local or technical—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade, or by a particular class of persons—and words which have two meanings, the one common and universal, the other technical, peculiar, or local. In either case, extrinsic evidence of usage will alike be admissible to define and explain the technical, peculiar, or local meaning of the language employed; though in the latter case, it will also be necessary to prove such additional circumstances as will raise a presumption

(*t*) (1842) 9 Cl. & F. 555, 556, per Parke, B.; 566, 567, per Tindal, C.J.; Wigr. Wills, 61.

(*u*) *Goblet* v. *Beechey*, (1829) 3 Sim. 24; 9 L. J. (O.S.) Ch. 200; *Masters* v *Masters*, (1718) 1 P. Wms. 425; *Norman* v. *Morrell*, (1799) 4 Ves. 769; 4 R. R. 347.

(*v*) As will presently be seen (*post*, §§ 1204, 1205), the word "usage" is frequently used by lawyers to denote a species of evidence, often admitted for the purpose of explaining ancient ambiguous grants, and consisting in the proof of the contemporaneous acts of the grantors or grantees, in relation to the property conveyed

(*x*) See *ante*, § 181.

that the parties intended to use the words in what logicians call their second intention, unless this fact can be inferred from reading the instrument itself. Thus, where the founder of a charity in the early part of the eighteenth century had, in the deed of grant, described the objects of her munificence as "Godly preachers of Christ's Holy Gospel," and it became necessary to determine what persons were entitled to the charity—extrinsic evidence was admitted to show that at that period of history a religious sect existed, who applied this particular phraseology, capable though it seemed at first sight of a far wider interpretation, to Protestant Trinitarian Dissenters, and that the founder was herself a member of such sect (*y*). Lord Lyndhurst thus stated the principle:—"If the terms which are made use of are obscure, doubtful or equivocal, either in themselves or in the application of them, it then becomes the duty of the Court to ascertain by evidence what was the intent of the founder, in what sense the particular expressions were used."

§ 1162. Various words in written documents, which *prima facie* present no ambiguity, have been interpreted by extrinsic evidence of usage; and their peculiar meaning, when found in connection with the subject-matter of the transaction, has been fixed, by parol testimony of the sense in which they were usually received, when employed in cases similar to that under investigation (*z*).

(*y*) *Shore* v. *Wilson*, (1842) 9 Cl. & F. 355, 580; 57 R. R. 2, per Ld. Cottenham See, also, *Drummond* v. *Att.-Gen.*, (1849) 2 H. L. C. 837, 857; 81 R. R. 433.

(*z*) Some of the principal expressions, which have been interpreted in this way, are the following:—"All Faults": *Whitney* v. *Boordman*, (1875) Mass. 242 (Am.). "Arrived in Dock," in a charterparty: *Steamship Co. Norden* v. *Dempsey*, (1876) 45 L. J. C. P. 764. "Barrel": *Miller* v. *Stevens*, (1868) 100 Mass. 518 (Am.). "Best oil," in a contract: *Lucas* v. *Bristow*, (1858) E. B. & E. 907; 27 L. J. Q. B. 364; 113 R. R. 944. "Corn": *Mason* v. *Skurray*, (1780) Park. Ins. 245; *Moody* v. *Surridge*, (1798) Park Ins. 245; 5 R. R. 757; *Scott* v. *Bourdillion*, (1806) 2 Bos. & P. N. R. 213; 9 R. R. 644. "Cotton in bales": *Taylor* v. *Briggs*, (1827) 2 C. & P. 525; *Gorrisson* v. *Perrin*, (1857) 2 C. B. (N.S.) 681; 27 L. J. C. P. 29; 109 R. R. 830. "Current funds": *Thorington* v. *Smith*, (1868) 8 Wall. N. S. 1 (Am.). "Crop of flax": *Goodrich* v. *Stevens*, (1871) 5 Lans. N. Y. 230 (Am.). "Days," in a bill of lading, as meaning working days: *Cochran* v. *Retberg*, (1803) 3 Esp. 121. "Duly honoured," as applied to a bill of exchange: *Lucas* v. *Groning*, (1816) 7 Taunt. 164. "Expected to arrive about November next" is a phrase which in a bought note is a mere description, and creates no contract as to time: *Bold* v. *Rayner*, (1836) 1 M. & W. 343; 5 L. J. Ex. 172; 46 R. R. 322. "F.O.B.": *Silberman* v. *Clark*, (1884) 96 N. Y. 524 (Am.). "Freight": *Peisch* v *Dixon*, (1815) 1 Mason, 11 (Am.); *Gibbon* v. *Young*, (1818) 2 Moore C. P. 224; 19 R. R. 510; *Lewis* v. *Marshall*, (1844) 7 Man. & G. 729; 13 L. J. C. P. 193; 66 R. R. 77. "Fur": *Astor* v. *Union Insurance Co.*, (1827) 7 Cowen, 202 (Am.). "Inhabitant": *R.* v. *Mashiter*, (1837) 6 A. & E. 153; 6 L. J. K. B. 121; 45 R. R. 433; *R.* v. *Davie*, (1837) 6 A. & E. 386; 45 R. R. 494. "In turn to deliver," in a charterparty: *Robertson* v. *Jackson*, (1845) 2 C. B. 312; 15 L. J. C. P. 28; 69 R. R. 490; *Leidemann* v. *Schultz*, (1853) 14 C. B. 38; 23 L. J. C. P. 17; 98 R. R. 523. "Level," as understood by miners: *Clayton* v. *Gregson*, (1836) 5 A. & E. 302; 44 R. R. 427. "Market": *Charrington & Co., Ld.* v. *Wooder*, [1914] A. C. 71; 83 L. J. K. B. 220. "Months," in a charterparty, as meaning calendar months: *Jolly* v. *Young*, (1800) 1 Esp. 186; recognised in *Simpson* v. *Mar-*

§ 1163. By an extension of this same principle of construction, the expression "in the month of October" has been allowed to be shown by parol evidence to be the usage of merchants to fix the exact part of that month for the sailing of a vessel (*a*). So, where a ship was warranted "to depart with convoy," extrinsic evidence was admitted to show at what place convoy for such a voyage as the one then contemplated was usually taken; and to that place the parties were presumed to refer (*b*). So, also, the responsibility of an underwriter for "general average" under an ordinary policy of insurance on a ship and cargo, may be limited by a custom of trade, so as not to extend to the jettison of goods which have been stowed on deck (*c*). So parol evidence has been admitted to show that the term "weekly accounts" in a building contract has, by the usage of trade, a technical signification, and means accounts of day-work only, exclusive of work which is capable of being measured (*d*). Where agents have purported to sign "by telegraphic authority as agents," evidence has been admitted to show that by mercantile usage under such words the agents are not responsible for a term in the contract arising from a mistake in the transmission of the message (*e*). Where goods having been sent to a London packer to prepare for exportation, and he acknowledged their receipt "on account of the vendor for the vendee," evidence of usage was admitted to prove that, when packers signed receipts in this form, it was their duty not to part with the goods without the vendor's further orders (*f*). So, also, where an Irish corn merchant had sent written instructions to his *del credere* agent in

gitson, (1847) 11 Q. B. 32; 17 L. J. Q. B. 81; 75 R. R. 278. "Payable in Trade": *Dudley* v. *Vose*, (1873) 114 Mass. 34 (Am.). "Pig Iron": *Mackenzie* v. *Dunlop*, (1856) 3 Macq. H. L. 26. "Regular turns of loading": *Leidemann* v. *Schultz*, *supra*. "Salt": *Jornu* v. *Bourdien*, (1787) Park, Ins. 245. "Spitting of blood," as a term in a policy of insurance: *Singleton* v. *St. Louis*, &c., (1877) 66 Mo. 63 (Am.). "Street," as used in the Public Health Act; *Elliott* v. *South Devon R. C.*, (1848) 2 Ex. 725; 17 L. J. Ex. 262; 76 R. R. 754. "Ten pockets of Kent hops at five pounds," as meaning in the hop trade at five pounds per cwt.: *Spicer* v. *Cooper*, (1841) 1 Q. B. 424; 10 L. J. Q. B. 241; 55 R. R. 298. "Thousand," as locally applied to rabbits on a warren: *Smith* v. *Wilson*, (1832) 3 B. & Ad. 729; 1 L. J. K. B. 194; 37 R. R. 536; recognised in *Shore* v. *Wilson*, (1842) 9 Cl. & F. 355; 57 R. R. 2. "Weeks," as meaning in a theatrical contract only weeks during the theatrical season': *Grant* v. *Maddox*, (1846) 15 M. & W. 737; 16 L. J. Ex. 227; 71 R. R. 815; and see *Myers* v. *Sarl*, (1860) 3 E. & E. 306. *In Symonds* v. *Lloyd*, (1859) 6 C. B. (N.S.) 691; 120 R. R. 335; the rule seems to have been strained to its utmost extent.

(*a*) *Chamand* v. *Angerstein*, (1791) Peake, 43. See, also, *Robertson* v. *Jackson*, (1845) 2 C. B. 412; 15 L. J. C. P. 28; 69 R. R. 490; *U. S.* v. *Breed*, (1832) 1 Sumn. 159 (Am.).

(*b*) *Lethulier's Case*, (1692) 2 Salk. 443; recognised by Williams, J., in *Shore* v *Wilson*, (1842) 9 Cl. & F. 543; 57 R. R. 2.

(*c*) *Miller* v. *Tetherington*, (1861) 30 L. J. Ex. 217; 126 R. R. 783; 7 H. & N. 954. See *Kidston* v. *Empire Marine Ins. Co.*, (1866) L. R. 2 C. P. 357; 35 L. J. C. P. 250.

(*d*) *Myers* v. *Sarl*, (1860) 3 E. & E. 306; 30 L. J. Q. B. 9; 122 R. R. 710.

(*e*) *Lilly & Co.* v. *Smales*, [1892] 1 Q. B. 456.

(*f*) *Bowman* v. *Horsey*, (1837) 2 M. & Rob. 85.

London, to sell some oats "on his account," parol evidence was held admissible on the agent's part, for the purpose of showing that, by the custom of the London corn trade, he was warranted under these instructions in selling in his own name (*g*), and by custom brokers who do not disclose their principal (*h*), or who sign as "agents to merchants," but do not state within a certain time for whom they are agents (*i*), may be liable as principals.

§ 1164. The reports contain many cases, where the language of policies has been explained by evidence of the understood practice of making voyages in particular branches of trade (*k*). For instance, though, according to the general import of the words "at and from," a policy would attach upon the ship's first mooring in a harbour on the coast; yet, where these expressions were employed in a Newfoundland policy, they were explained by evidence of usage to mean that the risk should not commence till the expiration of the fishing, technically called "banking," or of an intermediate voyage (*l*). In all cases of this kind it is unnecessary for the assured or his broker to communicate the usage to the underwriter, because, as Lord Mansfield has observed, "every underwriter is presumed to be acquainted with the practice of the trade he insures; and if he does not know it, he ought to inform himself" (*m*).

§ 1165. But, though evidence of usage may be admissible to explain what is doubtful, it is not admissible to contradict or vary what is plain (*n*); and therefore, if the words employed in a written instrument have a known legal meaning, parol evidence that the parties intended to use them in some different, though popular, sense, will be rejected; unless the words, if interpreted according to their strict legal acceptation, be wholly insensible with reference, either to the context or to the extrinsic facts (*o*). Thus, if a word denoting weight,

(*g*) *Johnston* v. *Usborne*, (1841) 11 A. & E. 549; 52 R. R. 445.

(*h*) *Fleet* v. *Murton*, (1871) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(*i*) *Hutchinson* v. *Tatham*, (1873) L. R. 8 C. P. 482; 42 L. J. C. P. 260.

(*k*) See *Trueman* v. *Loder*, (1840) 11 A. & E. 600; 9 L. J. Q. B. 165; 52 R. R. 451; and *Milward* v. *Hibbert*, (1842) 3 Q. B. 135, 137; 11 L. J. Q. B. 137; 61 R. R. 155.

(*l*) *Vallance* v. *Dewar*, (1808) 1 Camp. 503, 508; 10 R. R. 738; *Ougier* v. *Jennings*, (1800) *id.* 505, 506, n.; 10 R. R. 733, n.; *Kingston* v. *Knibbs*, (1809) *id.* 108; 10 R. R. 742.

(*m*) *Noble* v. *Kennoway*, (1780) 2 Doug. 513; cases cited in last note; *Da Costa* v. *Edmunds*, (1815) 4 Camp. 143; 16 R. R. 763.

(*n*) *Blackett* v. *Royal Exchange Assurance Co.*, (1832) 2 Cr. & J. 249, 250; 1 L. J. Ex. 101; 37 R. R. 695; *Crofts* v. *Marshall*, (1836) 7 C. & P. 597, 607; 48 R. R. 828. See, also, *Phillips* v. *Briard*, (1856) 25 L. J. Ex. 233; 1 H. & N. 21; 108 R. R. 431; *Abbott* v. *Bates*, (1876) 45 L. J. C. P. 117. Expert evidence as to the meaning of ordinary English words in a modern Act of Parliament of general application is not admissible: *Marquis of Camden* v. *Commissioners of Inland Revenue*, [1914] 1 K. B. 641; 83 L. J. K. B. 509, affirmed in H. L. [1915] A. C. 241; 84 L. J. K. B. 145.

(*o*) Wigr., Wills, 11, 12, cited *ante*, § 1131, n. s.

measure, or number, has had a definite meaning attached to it by the Legislature, any party using that word in a written contract or a will, will be conclusively presumed to have used it in such sense, unless the contrary clearly appears from some part of the writing itself (*p*). It seems, too, that, since the Act of Parliament passed for altering the style, the words Lady Day and Michaelmas, if used in a lease, have respectively been presumed to mean the 25th of March and the 29th of September; and no parol evidence of the custom of the country is admissible to show that the parties used these words with reference to the old style (*q*). In several cases, however, of parol demises, such evidence has been received (*r*); but whether the distinction hitherto drawn between a letting by deed, and a letting by parol, would now be sustained, may admit of a serious doubt.

§ 1166 (*s*). On a warranty of prime singed bacon, evidence of a practice in the trade to receive bacon slightly tainted as prime singed, has been rejected (*t*). So, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible (*u*). So, parol evidence has been rejected, when tendered for the purpose of proving that the words "glass ware in casks," contained in the memorandum of excepted articles in a fire policy, meant, according to the understanding of insurers and insured, such ware in open casks only (*v*). So, where a bill of lading contained the usual clause, "the dangers of the sea only excepted," the court held, that the shipowners could not rely on an established custom in the trade, that persons in their position should only be liable for damages occasioned by their own neglect, provided they saw the merchandise properly secured and stowed (*x*). So, also, where some linseed was bought to be delivered at Hull, and "fourteen days to be allowed for its delivery from the time of the ship's being ready to discharge," evidence to show that

(*p*) *Smith* v. *Wilson*, (1832) 3 B. & Ad. 731—734; 1 L. J. K. B. 194; 37 R. R. 536; *O'Donnell* v. *O'Donnell*, (1882) 1 L. R. Ir. 284; aff. on app., 13 L. R. Ir. 226; *Hockin* v. *Cooke*, (1791) 4 T. R. 314; *Att.-Gen.* v. *Cart Plate Glass Co.*, (1792) 1 Anstr. 39; *Noble* v. *Durell*, (1789) 3 T. R. 271; *Sleght* v. *Rhinelander*, (1806) 1 Johns. 192; *Frith* v. *Barker*, (1807) 2 Johns. 335; *Stoever* v. *Whitman*, (1814) 6 Binn. 417; *Henry* v. *Risk*, (1788) 1 Dall. 465.

(*q*) *Doe* v. *Lea*, (1809) 11 East, 312.

(*r*) *Doe* v. *Benson*, (1821) 4 B. & Ald. 588; *Furley* v. *Wood*, (1794) 1 Esp. 198.

(*s*) Gr. Ev. § 292, in part.

(*t*) *Yates* v. *Pym*, (1816) 6 Taunt. 446. See, also, *Malcomson* v. *Morton*, (1847) 11 Ir. L. R. 230.

(*u*) *Blackett* v. *Royal Exchange Assurance Co.*, *supra*. See *Hall* v. *Janson*, (1855) 4 E. & B. 500; 24 L. J. Q. B. 77; 99 R. R. 578. But see, also, *Miller* v. *Tetherington*, (1862) 7 H. & N. 954; 38 L. J. Ex. 217; 126 R. R. 783; and *Myers* v. *Sarl*, (1861) 30 L. J. Q. B. 9; 3 E. & E. 306; 122 R. R. 710; both cited *ante*, § 1162.

(*v*) *Bend* v. *Georgia Ins. Co.*, *Sup. Ct.*, *N. York*, (1842) cited in Gr. Ev. § 292.

(*x*) *The Schooner Reeside*, (1837) 2 Sumn. 567.

this stipulation was intended by the parties for the benefit, not of the seller, but of the buyer, who had the option of accepting the seed during any portion of the fourteen days, has been rejected (*y*). Also, evidence to show that, on a charterparty containing terms clearly defining who is to bear the expense of delivery, there is a custom regulating the subject has been rejected (*z*).

§ 1167. Where goods had been sold through a London broker under a written contract, which stipulated that payment should be made by bills, Lord Ellenborough rejected evidence of a custom, that bills meant approved bills, and that the vendor had the option of rejecting any bill of which he disapproved (*a*).

§ 1168. Parol evidence of usage or custom is not confined to cases where the written instrument is expressed in ambiguous technical language; for (*b*) it is certainly sometimes admissible "to annex incidents," as it is termed—that is, to show what things are customarily treated as incidental and accessorial to the principal thing, which is the subject of the contract, or to which the instrument relates. For instance, when a bill of exchange or promissory note payable either at a fixed time or on demand (not being one payable in England upon demand) (*c*), is silent as to any days of grace in England, three days, called "days of grace," are (subject to provisions as to holidays) added to the time of payment as fixed by the bill (*d*), and where a bill is payable elsewhere than in England parol evidence of the known and established usage of the country or place is admissible to show on what day the grace expired (*e*). So, it may be proved by parol that it is the custom in particular trades, under general contracts of hiring and service, for the contracts to be defeasible on giving a month's notice on either side (*f*), or for the

(*y*) *Sotilichos* v. *Kemp*, (1848) 3 Ex. 105.

(*z*) *The Nifa*, [1892] P. 411. And see also *Scrutton* v. *Childs*, (1877) 36 L. T. 212; *Hayton* v. *Irwin*, (1879) 5 C. P. D. 130; *Lishman* v. *Christie*, (1887) 19 Q. B. D. 333; 56 L. J. Q. B. 538.

(*a*) *Hodgson* v. *Davies*, (1810) 2 Camp. 532; 11 R. R. 789; approved of by Ld. Denman in *Trueman* v. *Loder*, (1840) 11 A. & E. 599; 9 L. J. Q. B. 165; 52 R. R. 451. Although the same learned judge, in a subsequent stage of the case, admitted evidence of a usage of trade, which reserved to vendors, selling through brokers in the manner above stated, the power of annulling the contract within a reasonable time after the name of the purchaser had been communicated to them—serious doubts may be entertained whether he was right in so doing; and whether the custom, thus allowed to be proved, was so incidental to the contract, as, in the absence of express words, to be incorporated in it.

(*b*) Gr. Ev. § 294, as to four lines.

(*c*) Which is not entitled to any days of grace: see 45 & 46 V. c. 61, ss. 10—14.

(*d*) 45 & 46 V. c. 61, s. 14.

(*e*) *In Renner* v. *Bank of Columbia*, (1824) 9 Wheat. 581, the decisions on this point are reviewed by Thompson, J.

(*f*) *Parker* v. *Ibbetson*, (1858) 4 C. B. (N.S.) 348; 27 L. J. C. P. 236; 114 R. R. 752.

persons employed to have certain holidays in the year, and the Sundays to themselves (*g*). So, it may be shown by parol that a heriot is due by custom on the death of a tenant for life, though it be not expressed in the lease (*h*). So, a lessee by deed may show, that, by the custom of the country, he is entitled to an away-going crop, though no such right be reserved in the deed (*i*). So, a publican, holding premises under a written agreement, which reserved a weekly rent, but was otherwise silent as to the period of the tenancy, has been allowed in Ireland to prove a custom among licensed victuallers, according to which a tenant paying in advance the yearly victualler's licence, is deemed to have a yearly tenure, though the rent be payable weekly (*k*).

§ 1169. Again, in an action for the price of tobacco, evidence will be admissible to show, that, by the usage of the trade, all sales of tobacco are by sample, although this term be not expressed in the bought and sold notes (*l*). In another case, where a quantity of linseed oil had been sold through London brokers by bought and sold notes, and the name of the purchaser was not disclosed in the bought note, evidence was received of a usage of trade in the City, by which every buying broker, who did not, at the date of the bargain, name his principal, rendered himself liable to be treated by the vendor as the purchaser (*m*). So, where a person had contracted in the body of a charterparty "as agent," evidence was admitted to show a custom that he should be personally liable, if he did not disclose the name of his principal within a reasonable time (*n*). So, where some mining shares had been sold upon the terms that they should be paid for "half in two, and half in four months," but the contract was silent as to the time of their delivery, the court, in an action against the purchaser for not accepting and paying for the shares, admitted

(*g*) *R.* v. *Stoke-upon-Trent* (*Inhabitants*), (1843) 5 Q. B. 303; 13 L. J. M. C. 41.

(*h*) *White* v. *Sayer*, (1622) Palm. 211.

(*i*) *Wigglesworth* v. *Dallison*, (1778) 1 Doug. 201; *Senior* v. *Armitage*, (1816) Holt, N. P. 197; 17 R. R. 627; explained by Parke, B., in 1 M. & W. 476; *Hutton* v. *Warren*, (1836) 1 M. & W. 466; 5 L. J. Ex. 234; 46 R. R. 368. See *In re Estate of M. of Waterford*, (1871) I. R. 5 Eq. 434.

(*k*) *Lundy* v. *Reilly*, (1858) 30 L. T. 223.

(*l*) *Syers* v. *Jonas*, (1848) 2 Ex. 111; 76 R. R. 515; *O'Neill* v. *Bell*, (1866) I. R. 2 C. L. 68. See, also, *Brown* v. *Byrne*, (1854) 3 E. & B. 703; 23 L. J. Q. B. 313; 97 R. R. 715; *Cuthbert* v. *Cumming*, (1855) 11 Ex. 405; 24 L. J. Ex. 310; 105 R. R. 593; *Lucas* v. *Bristow*, (1858) 27 L. J. Q. B. 364; E. B. & E. 907.

(*m*) *Dale* v. *Humfrey*, (1858) 27 L. J. Q. B. 390; E. B. & E. 1004; 113 R. R. 964; *Imperial Bk.* v. *London & St. Katherine's Dock Co.*, (1877) 5 Ch. D. 195; 46 L. J. Ch. 335; *Fleet* v. *Murton*, (1872) L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. See *Southwell* v. *Bowditch*, (1876) 1 C. P. D. 100; 45 L. J. C. P. 630. Where however such a custom is inconsistent with the contract itself evidence is not admissible: *Barrow* v. *Dyster*, (1884) 13 Q. B. D. 635.

(*n*) *Pike* v. *Ongley*, (1887) 18 Q. B. D. 708; 56 L. J. Q. B. 373; *Hutchinson* v. *Tatham*, (1873) L. R. 8 C. P. 482.

evidence of a usage among brokers, that on contracts for the sale of mining shares, the vendor was not bound to deliver them without contemporaneous payment (*o*). So, where a horse had been sold by private contract at a repository, with a written warranty of soundness, and the purchaser afterwards brought an action against the seller, the horse turning out to be unsound, the defendant was permitted to show that, by one of the printed regulations hung up in the repository, warranties were only to remain in force till twelve o'clock on the day after the sale; and then, upon further proof, that the plaintiff was aware of this regulation, and yet made no complaint within the specified time, a nonsuit was directed to be entered (*p*). Moreover, a custom that all steamships having a general cargo, coming into a certain port, shall discharge their goods on the quay, may be annexed even to a bill of lading of goods which says that the goods are to be discharged in good order from the ship's tackles (*q*); nor is a custom that all goods may, unless demanded within twenty-four hours of a ship's arrival, be landed on the quay, inconsistent with one which provides that goods are to be delivered by a person appointed by the ship's agents, the delivery to be according to the custom of the port (*r*).

§ 1170. This rule of annexing incidents by parol, which, time out of mind, has been adopted in explanation of mercantile proceedings, and is now generally applied to contracts respecting any transaction wherein known usages have prevailed, rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter (*s*). But here it must be borne in mind, that "incidents" are frequently "annexed" to contracts, and conditions implied, not only by the usage or custom of trade, which is always a matter of evidence, but by the law-merchant, which is judicially noticed without proof (*t*), and by the common law (*u*), and also occasionally by statute. This doctrine of legal implication is sufficiently abstruse, and the soundest lawyers are often at fault, when called upon to apply it to the varying transactions of life. On some matters,

(*o*) *Field* v. *Lelean*, (1861) 30 L. J. Ex. 168; 6 H. & N. 617; 123 R. R. 729. See *Godts* v. *Rose*, (1855) 17 C. B. 229; 25 L. J. C. P. 61; 104 R. R. 668.

(*p*) *Bywater* v. *Richardson*, (1834) 1 A. & E. 508; 3 L. J. K. B. 164; 40 R. R. 349. See *Smart* v. *Hyde*, (1841) 8 M. & W. 723; 10 L. J. Ex. 479; 58 R. R. 867; and *Foster* v. *Mentor Life Assurance Co.*, (1854) 3 E. & B. 48; 23 L. J. Q. B. 145; 97 R. R. 360.

(*q*) *Marzetti* v. *Smith*, (1883) 49 L. T. 580.

(*r*) *Aste* v. *Stumore*, (1884) 13 Q. B. D. 326; 53 L. J. Q. B. 82.

(*s*) *Hutton* v. *Warren*, (1836) 1 M. & W. 475; 5 L. J. Ex. 234; 46 R. R. 368; per Parke, B.; *Gibson* v. *Small*, (1853) 4 H. L. C. 397; 94 R. R. 138.

(*t*) *Ante*, § 5.

(*u*) *Gibson* v. *Small*, *supra*.

however, of frequent occurrence the law has been settled by judicial decisions.

§ 1171. The warranties implied in marine insurance which before 1907 were attached to marine policies by the law merchant and by usage are now statutory (*v*). The most important implied warranty is of seaworthiness (*x*); another implied warranty is of the legality of the adventure (*y*). In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (*z*). Where the policy attaches while the ship is in port there is also an implied warranty that she shall at the commencement of the risk be reasonably fit to encounter the ordinary perils of the port (*a*). But the law of England implies no warranty that the lighters employed to land the cargo at the port of discharge shall be seaworthy (*b*); none that the vessel shall continue seaworthy after the voyage has commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament; none on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed upon underwriters in America (*c*). Where the policy relates to a voyage which is performed in different stages during which the ship requires different kinds of or further preparation and equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage (*d*). In the case of a time policy, there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness (*e*). In a policy on goods or other movables there is no warranty that the goods or movables are seaworthy (*f*). But in a voyage policy on goods or other

(*v*) The Marine Insurance Act, 1906 (6 Ed. 7, c. 41).
(*x*) S. 39.
(*y*) S. 41.
(*z*) S. 39 (1).
(*a*) S. 39 (2).
(*b*) *Lane* v. *Nixon*, (1866) L. R. 1 C. P. 412.
(*c*) *Gibson* v. *Small*, *supra*. See, also, *Biccard* v. *Shepherd*, (1861) 14 Moore P. C. 471; 134 R. R. 74.
(*d*) *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1903] 2 K. B. 657; 72 L. J. K. B. 868. 6 Ed. 7, c. 41, s. 39 (3).
(*e*) S. 39 (5).
(*f*) S. 40 (1).

movables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or movables to the destination contemplated by the policy (*g*).

§ 1172. In every contract by a common carrier, or by a shipowner (*h*), whether a common carrier or not, for the carriage for hire, whether by land (*i*) or by water (*k*), of goods, which term includes live animals (*l*), the law implies an insurance on his part, that—unless prevented either by "the act of God or by the public enemies of the Crown," or by the "proper vice" of the animal, or by the inherent quality of the article (*m*)—he will safely deliver at its destination the property entrusted to his care. The carrier by land, therefore, warrants that his carriage is roadworthy, and the shipowner that his ship is seaworthy (*n*). These stringent laws, however, do not extend to forwarding agents, as distinguished from common carriers, at least when they have made special contracts with their employers (*o*); neither do they apply to the carriers of passengers, who do not impliedly warrant either the roadworthiness of their vehicles, or the seaworthiness of their vessels, so as to render themselves liable for injuries caused by mere latent defects (*p*)—although bound to exercise the utmost care and skill in the conduct of their business (*q*), and responsible to their employers for every accident occasioned by negligence however slight (*r*).

§ 1174. In contracts for the *sale of estates* (*s*), whether freehold or leasehold, the law, in the absence of an express stipulation to the

(*g*) S. 40 (2).

(*h*) *Nugent* v. *Smith*, (1876) 1 C. P. D. 423; 45 L. J. C. P. 697.

(*i*) *Riley* v. *Horne*, (1828) 5 Bing. 533; 7 L. J. (O.S.) C. P. 32; 30 R. R. 576.

(*k*) *Lyon* v. *Mells*, (1802) 5 East, 428; 7 R. R. 726; *Liver Alkali Co.* v. *Johnson*, (1874) L. R. 9 Ex. 338; 43 L. J. Ex. 216.

(*l*) *McManus* v. *Lanc. & York. Ry.*, (1859) 4 H. & N. 327; 28 L. J. Ex. 358; 118 R. R. 470; *Nugent* v. *Smith*, *supra*; *Tattershall* v. *Nat. Steamship Co.*, (1884) 12 Q. B. D. 297; 53 L. J. Q. B. 332.

(*m*) *Kendall* v. *L. & S. W. Ry.*, (1872) L. R. 7 Ex. 373; 41 L. J. Ex. 184; *Blower* v. *G. W. Ry.*, (1872) L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Nugent* v. *Smith*, *supra*.

(*n*) *Kopitoff* v. *Wilson*, (1876) 45 L. J. Q. B. 436; 1 Q. B. D. 377; *Cohn* v. *Davidson*, (1877) 2 Q. B. D. 455; 46 L. J. Q. B. 305; *Steel* v. *State Line Steamship Co.*, (1877) 3 App. Cas. 72. See, also, *Tattershall* v. *National Steamship Co.*, *supra*; and *ante*, § 187.

(*o*) *Scaife* v. *Farrant*, (1875) L. R. 10 Ex. 358; 44 L. J. Ex. 36.

(*p*) *Readhead* v. *Midland Ry. Co.*, (1869) L. R. 4 Q. B. 379; 38 L. J. Q. B. 169; *Buxton* v. *North Eastern Ry.*, (1869) 9 B. & S. 824; 37 L. J. Q. B. 258; *Ingalls* v. *Bills*, (1845) 9 Metc. 1.

(*q*) This doctrine was applied to a job-master who had let out a carriage which broke down, in *Hyman* v. *Nye*, (1881) 6 Q. B. D. 685.

(*r*) See *John* v. *Bacon*, (1870) L. R. 5 C. P. 437; *Simpson* v. *London General Omnibus Co.*, (1873) L. R. 8 C. P. 390; 42 L. J. C. P. 112.

(*s*) See the Conveyancing Act, 1881, 44 & 45 V. c. 41, ss. 3, 7.

contrary, implies an undertaking on the part of the vendor that he will make out a good title (*t*), and an undertaking on the part of the vendee, that, if the title prove defective, the damages to which he shall be entitled, shall be limited to the expenses actually incurred in the investigation, and shall be merely nominal for the loss of the bargain (*u*). If, indeed, it shall turn out that the vendor has been guilty of any fraudulent misrepresentation or concealment, or that he has contracted to sell an estate in which he has no reasonable ground for believing that he has any interest whatever (*v*), or if, though able to furnish a marketable title, he has simply declined to do so, or to take the steps necessary for giving possession (*x*), then the case will fall within the general rule of law, that where a person makes a contract and afterwards breaks it, he must pay the whole damage sustained by the party with whom he contracts (*y*). Accordingly, whilst the limited liability attaches only upon a vendor of leaseholds who is unable to obtain the necessary consent of his lessor to assign, he will be liable to the larger measure of damages where the contract goes off in consequence of his omission to use reasonable efforts to procure the lessor's licence (*z*). The same result would also follow, should the question arise on an executed contract, and the indenture contain a covenant for quiet enjoyment (*a*).

§ 1175. An agreement to grant a lease contains an implied undertaking on the part of the intended lessor that he has title to grant a valid lease (*b*); and in every demise of real property, whether by deed

(*t*) *Souter* v. *Drake*, (1834) 5 B. & Ad. 992; 3 L. J. K. B. 31; 39 R. R. 715; *Doe* v. *Stanion*, (1836) 1 M. & W. 695, 701; 5 L. J. Ex. 253; 46 R. R. 464; *Hall* v. *Betty*, (1842) 4 Man. & G. 410; 11 L. J. C. P. 256; *Worthington* v. *Warrington*, (1848) 5 C. B. 635; 17 L. J. C. P. 117; 75 R. R. 821. These cases overrule *George* v. *Pritchard*, (1826) Ry. & M. 417. See *Kintrea* v. *Perston*, (1856) 1 H. & N. 357; 25 L. J. Ex. 287; 108 R. R. 624.

(*u*) *Flureau* v. *Thornhill*, (1775) 2 W. Bl. 1078; *Walker* v. *Moore*, (1829) 10 B. & C. 416; 8 L. J. (O.S.) K. B. 159; *Robinson* v. *Harman*, (1848) 1 Ex. 855; 18 L. J. Ex. 202; *Bain* v. *Fothergill*, (1874) L. R. 7 H. L. 158; 43 L. J. Ex. 243; *Worthington* v. *Warrington*, *supra*; *Pounsett* v. *Fuller*, (1856) 17 C. B. 660; 25 L. J. C. P. 145; 104 R. R. 829; *Sikes* v. *Wild*, (1861) 4 B. & S. 421; 32 L. J. Q. B. 375; 129 R. R. 790; *Morgan* v. *Russell*, [1909] 1 K. B. 357; 78 L. J. K. B. 187; *Pease* v. *Courtney*, [1904] 2 Ch. 503; 73 L. J. Ch. 760.

(*v*) *Hopkins* v. *Grazebrook*, (1826) 6 B. & C. 31; 5 L. J. (O.S.) K. B. 65; *Robinson* v. *Harman*, *supra*. See *Sikes* v. *Wild*, *supra*.

(*x*) *Engell* v. *Fitch*, (1869) L. R. 4 Q. B. 659; 37 L. J. Q. B. 145. See *Godwin* v. *Francis*, (1870) L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*y*) In *Bain* v. *Fothergill*, (1874) L. R. 7 H. L. 207; 43 L. J. Ex. 243; Ld. Chelmsford expressed an opinion, that even if a man contracts for the sale of real estate, knowing that he has no title, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses incurred by an action for breach of contract; he can only obtain other damages by an action for deceit. *Sed qu.*

(*z*) *Day* v. *Singleton*, [1899] 2 Ch. 320; 68 L. J. Ch. 593; *Jones* v. *Gardiner*, [1902] 1 Ch. 191; 71 L. J. Ch. 93.

(*a*) *Lock* v. *Furze*, (1866) L. R. 1 C. P. 441; 35 L. J. C. P. 141.

(*b*) *Stranks* v. *St. John*, (1867) L. R. 2 C. P. 376; 36 L. J. C. P. 118.

or parol, the law annexes conditions that the lessor will give possession of the premises to the lessee (*c*), and that, provided the lessor's own interest in them continues (*d*), the lessee shall have quiet enjoyment of them (*e*), including an inalienable right to kill and take ground game thereon (*f*), and shall not be evicted during the term (*g*). No undertaking, however, for good title is implied by law from a demise by parol (*h*); nor, subject to section 14 of the Housing, Town Planning, &c., Act, 1909 (*i*), is any warranty implied that the subject-matter of a lease,—whether it consist of a house or of land,—shall, either at the commencement, or during the continuance, of the term, be in a proper state for habitation or cultivation, or that, in other respects, it shall be reasonably fit for the purpose for which it is taken (*k*). Neither does the law imply, from the relation of landlord and tenant, any obligation on the part of the landlord to do substantial repairs on notice (*l*); and even where the landlord is bound by special agreement

(*c*) *Coe* v. *Clay*, (1829) 5 Bing. 440; 7 L. J. (O.S.) C. P. 162; 30 R. R. 699; *Jinks* v. *Edwards*, (1856) 11 Ex. 775; 105 R. R. 787; *Drury* v. *Macnamara*, (1855) 5 E. & B. 612; 25 L. J. Q. B. 5; 103 R. R. 647.

(*d*) *Penfold* v. *Abbott*, (1863) 32 L. J. Q. B. 67; 139 R. R. 730; *Adams* v. *Gibney*, (1830) 6 Bing. 656; 8 L. J. (O.S.) C. P. 243; 31 R. R. 514; *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610; 64 L. J. Q. B. 787; *Jones* v. *Lavington*, [1903] 1 K. B. 253; 72 L. J. K. B. 98; *Pease* v. *Courtney*, [1904] 2 Ch. 503; 73 L. J. Ch. 760.

(*e*) *Bandy* v. *Cartwright*, (1853) 8 Ex. 913; 22 L. J. Ex. 285; 91 R. R. 836; *Hall* v. *City of London Brewery Co.*, (1862) 31 L. J. Q. B. 257; 2 B. & S. 737; 127 R. R. 541. See *Howard* v. *Maitland*, (1883) 11 Q. B. D. 695; 53 L. J. Q. B. 42; as to what constitutes a breach of a covenant for quiet enjoyment.

(*f*) 43 & 44 V. c. 47, ss. 1, 3.

(*g*) Per Parke, B., in *Sutton* v. *Temple*, (1843) 12 M. & W. 64; 13 L. J. Ex. 17; 67 R. R. 255; and in *Hart* v. *Windsor*, (1843) *id.* 85; 43 L. J. Q. B. 129; 67 R. R. 266.

(*h*) *Bandy* v. *Cartwright*, *supra*; overruling contrary dicta by Parke, B., in *De Medina* v. *Norman*, (1842) 9 M. & W. 827; 11 L. J. Ex. 370; 60 R. R. 912; and *Sutton* v. *Temple*, *supra*. The law in Ireland with respect to this subject is now contained in s. 41 of 23 & 24 V. c. 154, which enacts that every lease, made since 1st Jan., 1861, shall, unless otherwise expressly provided thereby, (see *Leonard* v. *Taylor*, (1874) I. R. 8 C. L. 300), imply an agreement by the landlord that he has a good title, and that the tenant shall have quiet enjoyment. S. 42 also enacts, that every such lease shall, unless otherwise expressly provided thereby, imply an agreement by the tenant to pay the rent, and all taxes and impositions payable by the tenant, and to keep the premises in good and substantial repair, and to deliver them up in such repair on the determination of the lease, accidents by fire without the tenant's default excepted.

(*i*) 9 Ed. 7, c. 44.

(*k*) *Sutton* v. *Temple*, (1843) 12 M. & W. 52; 13 L. J. Ex. 17; 67 R. R. 255; *Hart* v. *Windsor*, (1843) *id.* 68; 13 L. J. Ex. 129; 67 R. R. 266; *Murray* v. *Mace*, (1874) I. R. 8 C. L. 396; *Manchester Bonded Warehouse Co.* v. *Carr*, (1880) 5 C. P. D. 507; 49 L. J. C. P. 809. These cases overrule *Edwards* v. *Etherington*, (1825) Ry. & M. 268; *Collins* v. *Barrow*, (1831) 1 M. & Rob. 112; *Salisbury* v. *Marshall*, (1829) 4 C. & P. 65. In *Erskine* v. *Adeane*, (1873) 42 L. J. Ch. 395, Ld. Romilly held "that every landlord warranted his tenant that he would not keep noxious things (such as yew trees) near the tenant's estate," but this ruling was reversed on appeal, as being obviously contrary to the law: (1873) L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(*l*) *Gott* v. *Gandy*, (1853) 2 E. & B. 845; 23 L. J. Q. B. 1; 95 R. R. 848.

to keep the premises in repair during the tenancy, there is no implied condition that the tenant may quit if the repairs be not done (*m*).

§ 1176. In the case, however, of letting a *ready furnished* house, the law imposes an obligation upon the landlord to let the premises in a reasonably habitable state; and therefore, if the furniture be insufficient in quantity, or defective in quality, if the beds swarm with vermin, or the drains be out of order, or the house be infected with contagion, the tenant may quit without notice, unless, perhaps, in the event of his having had an opportunity of inspecting the premises by himself or his agent before entering on the occupation (*n*). This warranty, however, applies only to the state of the premises at the commencement of the tenancy, and there is no implied agreement that the premises shall continue fit for habitation during the term (*o*).

§ 1176A. The Housing, Town Planning, &c., Act, 1909 (*p*), (s. 14), enacts that in any contract "for letting for habitation a house or part of a house at a rent not exceeding (a) in the case of a house situate in the administrative county of London, forty pounds; (b) in the case of a house situate in a borough or urban district with a population according to the last census for the time being of fifty thousand or upwards, twenty-six pounds; (c) in the case of a house situate elsewhere, sixteen pounds; there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation, but the condition aforesaid shall not be implied when a house or part of a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term." Section 15 (1) provides that "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation."

§ 1177. On the sale of a specific ascertained chattel, the law of England,—like the Roman (*q*), the French (*r*), the Scotch (*s*), and,

(*m*) *Surplice* v. *Farnsworth*, (1844) 7 Man. & G. 576; 13 L. J. C. P. 215; 66 R. R. 760.

(*n*) *Smith* v. *Marrable*, (1843) 11 M. & W. 5; 12 L. J. Ex. 223; 63 R. R. 493; commented on by Ld. Abinger, in *Sutton* v. *Temple*, *supra*; and approved in *Wilson* v. *Finch Hatton*, (1877) 2 Ex. D. 336; 46 L. J. Ex. 489, S. C.

(*o*) *Sarson* v. *Roberts*, [1895] 2 Q. B. 395; 65 L. J. Q. B. 37.

(*p*) 9 Ed. 7, c. 44.

(*q*) See Domat, bk. 1, tit. 2, § 2, art. 3.

(*r*) Code Civil, c. 4, s. 1, art. 1603.

(*s*) Bell on Sale, 94.

in part, the American law (*t*),—annexes to the contract an implied warranty of title, and against incumbrances (*u*). Even before this was expressly enacted, a warranty might have been inferred, either from the usage of trade, or from the declaration or conduct of the vendor being such as to lead to the conclusion that he sold the property as "his own," or from the fact of the articles being bought in a shop professedly carried on for the sale of goods (*v*). With respect to executory contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, the law would probably imply that both parties meant that a good title to that subject should be transferred, in the same manner as it would imply, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept it if he discovered the defect of title before delivery; and if he did accept, and the goods were recovered from him, he would not be bound to pay for them, or having paid, he would be entitled to recover back the price, as on a consideration which had failed (*x*).

§ 1178. If the buyer of goods expressly, or by implication, make known to the seller the particular purpose for which they are required, so as to show that he relies on the seller's skill and judgment, and the goods are of a description which it is the seller's business to supply, there is (except in the case of patent goods, or goods sold under a trade name (*y*)) by statute an implied condition that the goods shall be reasonably fit for the purpose for which they are bought (*z*). Where too, goods are bought by description from a seller who deals in goods of that description (whether a manufacturer of them or not), there is an implied condition that the goods shall be of merchantable quality (*a*), provided that if the buyer has examined the goods, there is no warranty as regards defects which the examination ought to have revealed (*b*). Subject to the above enactment, where on a sale the

(*t*) *Defreeze* v. *Trumper*, (1806) 1 Johns. 274; *Rew* v. *Barber*, (1824) 3 Cowen, 272; Broom, Max. 628.

(*u*) The Sale of Goods Act, 1893 (56 & 57 V. c. 71), s. 12.

(*v*) *Morley* v. *Attenborough*, (1849) 3 Ex. 511—513; 18 L. J. Ex. 148; 77 R. R 709; *Eicholz* v. *Bannister*, (1864) 17 C. B. (N.S.) 708; 34 L. J. C. P. 105; 142 R. R. 594.

(*x*) *Morley* v. *Attenborough*, *supra*.

(*y*) As to this exception, see *Bristol Tramways Co.* v. *Fiat Motors*, [1910] 2 K. B. 831; 79 L. J. K. B. 1107; (motor omnibuses and omnibus chassis).

(*z*) The Sale of Goods Act, 1893 (56 & 57 V. c. 71), s. 14 (1).

(*a*) This applies to goods whether they are sold under a patent or trade name or otherwise; *Bristol Tramways Co.* v. *Fiat Motors*, *supra*.

(*b*) 56 & 57 V. c. 71, s. 14 (2). As to the former law, see *Wicler* v. *Schillizzi*, (1856) 17 C. B. 619; 25 L. J. C. P. 89; 104 R. R. 815; *Bigge* v. *Parkinson*, (1862) 7 H. & N. 955; 31 L. J. Ex. 301; 126 R. R. 783; *Beer* v. *Walker*, (1877) 46 L. J. C. P. 677. A publican, keeper of a tied house, sold beer brewed by his landlords to

purchaser has been afforded an opportunity of inspecting either the bulk or the sample, the maxim of *caveat emptor* is generally applicable, and the law does not imply any warranty, either as to their merchantable quality (*c*), or their value (*d*), or their fitness for the purpose for which they were bought (*e*), unless the defect be of such a nature as not to be readily discoverable by the inspection of the bulk or the sample (*f*). This doctrine even extends to the sale of food for the use of man (*g*), unless the vendor be a butcher, baker, vintner, or common victualler, in which case he will perhaps be presumed to have warranted that the provisions supplied by him were sound and wholesome (*h*). It is thought that since the Sale of Goods Act, whatever the law may formerly have been, cases of this class now fall to be dealt with under section 14, and that they would usually fall to be dealt with under sub-section 1, the case for the buyer being that he relied upon the skill and judgment of the seller to supply food fit for consumption. But it would seem from *Wren* v. *Holt* (*i*) that it may frequently, if not generally, be possible to bring the supply of food for immediate consumption by the buyer within sub-section 2 as a sale of goods by description, so as to raise the warranty that such goods were "merchantable" under the description, food unfit for human consumption by reason of containing ptomaine poison, or the like, being conceived as unmerchantable, and the warranty as being thus broken (*k*). The particular purpose for which an article purchased is

a customer in his bar, who knew by whom the beer was brewed, and did not rely upon the publican's skill or judgment. The beer contained arsenic and the publican was held liable under this subsection for supplying beer not of merchantable quality: *Wren* v. *Holt*, [1903] 1 K. B. 610; 72 L. J. K. B. 340.

(*c*) Independently, however, of the law of implied warranty, a party is not bound to accept and pay for chattels, unless they really answer the *description* of the articles which the vendor professed to sell, and the purchaser intended to buy. *Gompertz* v. *Bartlett*, (1853) 2 E. & B. 849; 23 L. J. Q. B. 65; 95 R. R. 851; *Nichol* v. *Godts*, (1854) 10 Ex. 191; 23 L. J. Ex. 314; 102 R. R. 523; *Young* v. *Cole*, (1837) 3 Bing. N. C. 724; 6 L. J. C. P. 201; 43 R. R. 783; *Hall* v. *Conder*, (1857) 2 C. B. (N.S.) 41; 25 L. J. C. P. 138; 109 R. R. 590; *Josling* v. *Kingsford*, (1863) 32 L. J. C. P. 94; 13 C. B. (N.S.) 447; 134 R. R. 596.

(*d*) *Kirkpatrick* v. *Gowan*, (1875) I. R. 9 C. L. 521. See *Smith* v. *Hughes*, (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(*e*) *Parkinson* v. *Lee*, (1802) 2 East, 314; 6 R. R. 429; recognised by Parke, B., in *Sutton* v. *Temple*, *supra*; and explained by Tindal, C. J., in *Shepherd* v. *Pybus*, (1842) 3 Man. & G. 880; 11 L. J. C. P. 101.

(*f*) *Mody* v. *Gregson*, (1868) L. R. 4 Ex. 49; 38 L. J. Ex. 12.

(*g*) *Burnby* v. *Bollett*, (1847) 16 M. & W. 644; *Le Neuville* v. *Nourse*, (1813) 3 Camp. 351; *Emmerton* v. *Matthews*, (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 126 R. R. 567.

(*h*) *Burnby* v. *Bollett*, (1847) 16 M. & W. 649, 654, 655; 17 L. J. Ex. 190; 73 R. R. 667; per Parke, B.

(*i*) *Supra*.

(*k*) *Wren* v. *Holt*, however, requires careful consideration. By reason partly of the form in which the case came before the Court of Appeal, by which it would seem that the court was bound by the finding of the jury and was not free to consider the matter at large, and partly by reason of the differences of opinion between the members of the Court, it can scarcely be considered to be a conclusive or satisfactory authority.

required may be made known to the seller by the recognised description by which the article is purchased (*l*). The question whether the buyer made known to the seller the particular purpose for which the goods were required so as to show that he relied on the seller's skill and judgment is one of fact, depending on the circumstances of the particular case (*m*). Although the contract is reduced into writing parol evidence is admissible of what the buyer said to the seller before the reduction into writing in order to raise the warranty (*n*).

§ 1178A. The Sale of Goods Act, 1893, purports to codify the law of the sale of goods and to be exhaustive, and it is necessary, therefore, to treat every case as falling within it (*o*). Subject to the provisions of that Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as provided by section 14.

By sub-section 3 of that section an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the *usage of trade*.

By sub-section 4 an express warranty or condition does not negative a warranty or condition implied by this act unless inconsistent therewith.

A sale in a market of animals suspected by the seller to be diseased (although by exposing them for sale his conduct may have been morally, or even statutably, culpable, does not render him liable as for false representation where such animals are sold under an express condition that they are sold "with all faults" and without any warranty (*p*).

§ 1179. Where a known ascertained chattel is specifically ordered by the buyer, the manufacturer who executes the order does not thereby impliedly warrant, that the article supplied by him shall be fit for the special purpose to which it is intended to be applied (*q*).

(*l*) *E.g.*, a hot water bottle; *Priest* v. *Last*, [1903] 2 K. B. 148; 72 L. J. K. B. 657; milk, *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608; 74 L. J. K. B. 386;

(*m*) *Priest* v. *Last*; *Frost* v. *Aylesbury Dairy Co.* In this last case the evidence which fixed the seller was printed matter laudatory of the seller, printed in the buyer's milk book supplied by the seller, setting forth the precautions which the seller took in the way of medical inspection, milk analysis, and so forth, to ensure purity of the milk.

(*n*) *Gillespie* v. *Cheney*, [1896] 2 K. B. 59; 65 L. J. Q. B. 552. As to what sort of a clause in a written contract excluding warranties will effectually exclude this implied warranty, see *Clarke* v. *Army and Navy Stores*, [1903] 1 K. B. 155; 72 L. J. K. B. 153.

(*o*) *Wren* v. *Holt*, *supra*, per Vaughan Williams, L. J., at p. 614.

(*p*) *Ward* v. *Hobbs*, (1878) 4 App. Cas. 13; 48 L. J. Q. B. 281.

(*q*) *Chanter* v. *Hopkins*, (1838) 4 M. & W. 399; 8 L. J. Ex. 14; 51 R. R. 650; *Ollivant* v. *Bayley*, (1843) 5 Q. B. 288; 13 L. J. Q. B. 34; 64 R. R. 501; recognised

But where the purchaser, instead of depending on his own judgment, may fairly be supposed to rely on the skill and knowledge of the vendor, the law implies a warranty that the chattel furnished shall be reasonably fit for the purpose for which it is known to be ordered (*r*); and no exception will be recognised in the case of latent undiscoverable defects (*s*). This doctrine will apply in a special manner to cases, where the articles are supplied directly by the manufacturer (*t*). It will also extend to natural products as well as to manufactured articles; and therefore, where a dealer in seed had sold some rape which he knew the purchaser required for seed, the court held that the contract contained an implied warranty that the rape was good growing seed, fit for germination (*u*).

§ 1179A. Before the Sale of Goods Act, 1893, it was held that on a sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, in the absence of any usage, in the particular trade or as regards the particular goods, to supply goods of other makers, there was an implied contract that the goods supplied should be of the manufacturer's own make (*v*). No similar provision, however, is contained in the Act.

§ 1179B. Upon a contract to let chattels for a particular purpose by a person who deals in or whose business it is to let such chattels, there is an implied warranty that the articles let shall be reasonably fit for the purpose for which they are supplied; thus, a job-master has been held liable for injuries resulting from the breaking down of a carriage let by him, in consequence of a latent defect (*x*), and a person letting out gear for unloading a ship, for injuries resulting from the defective condition of the gear supplied (*y*).

§ 1180. The vendor of any article with a trade mark or description upon it, is, by virtue of the Merchandise Marks Act, 1887, pre-

in *Parsons* v. *Sexton*, (1847) 4 C. B. 908; 16 L. J. C. P. 181; *Prideaux* v. *Bunnett*, (1857) 1 C. B. (N.S.) 613; 107 R. R. 824; *Hall* v. *Conder*, (1857) 2 C. B. (N.S.) 41; 25 L. J. C. P. 138; 109 R. R. 590.

(*r*) 56 & 57 V. c. 71, s. 14 (3). *Bigge* v. *Parkinson*, (1862) 31 L. J. Ex. 301, 303; 7 H. & N. 955, 961; 126 R. R. 783; *Brown* v. *Edgington*, (1841) 2 Man. & G. 279, 290; 10 L. J. C. P. 66; 58 R. R. 408; recognised in *Sutton* v. *Temple*, (1843) 12 M. & W. 64; 13 L. J. Ex. 17; 67 R. R. 255; *Mallan* v. *Radloff*, (1864) 17 C. B. (N.S.) 588; 142 R. R. 532.

(*s*) *Randall* v. *Newson*, (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102; *Frost* v. *Aylesbury Dairy Co.*, *supra*; *Wren* v. *Holt*, *supra*.

(*t*) *Shepherd* v. *Pybus*, *supra*; *Sutton* v. *Temple*, (1843) *supra*.

(*u*) *Shields* v. *Cannon*, (1865) 16 Ir. C. L. R. 588; *Jones* v. *Just*, (1868) L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.

(*v*) *Johnson* v. *Raylton*, (1881) 7 Q. B. D. 438; 50 L. J. Q. B. 753.

(*x*) *Hyman* v. *Nye*, (1881) 6 Q. B. D. 685.

(*y*) *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; 65 L. J. Q. B. 501; *Vogan* v. *Oulton*, (1899) 81 L. T. 435.

sumed to have contracted that the mark is genuine and the description true, "unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee" (*z*).

§ 1180A. By the Fertilisers and Feeding Stuffs Act, 1906 (*a*), certain warranties are implied upon the sale of fertilisers and feeding stuffs; and by the Milk and Dairies (Consolidation) Act, 1915 (*b*), where milk is sold or exposed or kept for sale it is presumed to be for human consumption or for use in the manufacture of products for human consumption, unless the contrary is proved.

§ 1181. It is now determined that the law implies no warranty on a contract for the sale of a patent, either that the vendor was the true and first inventor, or that the invention was either useful or new (*c*).

§ 1182. From the ordinary relation of master and domestic or menial servant, no contract, and therefore no duty, can be implied on the part of the master, to protect the servant against any injury arising, either from the negligence of another servant, or from the defective condition of the master's property, unless the personal negligence or other misconduct of the master can be shown to have caused, or, at least to have materially contributed to, the accident (*d*), or unless the master knew of the danger while the servant did not (*e*). This doctrine,—which, until the year 1880, was held applicable in its entirety to every employer of manual labour,—is now confined to the masters of domestic or menial servants. The liability of all other employers to make compensation for personal injuries suffered by workmen in their service, must depend on the Employers' Liability Act, 1880 (*f*). The most important sections of that statute are the first three, which are too long to insert in this work, but which deserve attentive study. Suffice it here to remark, first, that the Act does not apply, either to domestic servants, or to seamen; second, that the expression "employer," as used therein, "includes a body of persons corporate or unincorporate"; and third, that the expression "workman" includes a

(*z*) 50 & 51 V. c. 28, s. 17.
(*a*) 6 Ed. 7, c. 27, s. 1.
(*b*) 5 & 6 G. 5, c. 66, s. 19 (2).
(*c*) *Hall* v. *Conder*, *supra*; *Smith* v. *Neale*, (1857) *id.* 67; 26 L. J. C P. 143; 109 R. R. 611; *Notor* v. *Brooks*, (1861) 7 H. & N. 499; 126 R. R. 540; *Trotman* v. *Wood*, (1864) 16 C. B. (N.S.) 479; 139 R. R. 587.
(*d*) *Priestley* v. *Fowler*, (1837) 3 M. & W. 1; 7 L. J. Ex. 42; 49 R. R. 495; *Seymour* v. *Maddox*, (1851) 16 Q. B. 326; 20 L. J. Q. B. 327; 83 R. R. 484.
(*e*) *Griffith* v. *London, &c., Docks Co.*, (1884) 13 Q. B. D. 259; 53 L. J. Q. B. 504.
(*f*) 43 & 44 V. c. 42.

railway servant, and any person of any age, who,—being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour,—has entered into or works under a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour (*g*). The judges have held that the Act did not apply to a case, where the party injured was an omnibus conductor (*h*), or the driver of a tramcar (*i*), or a grocer's assistant (*k*). In addition to the liabilities under the Employers' Liability Act, it should be mentioned that by the provisions of the Workmen's Compensation Act, 1906 (*l*), employers are now in many cases liable to compensate their employees for injuries arising out of and in the course of their employment, although such injuries may have been occasioned without any negligence on the part of the employer or a fellow servant.

§ 1182A. The law, as regards seamen and sea apprentices, is now regulated in great measure by the Merchant Shipping Act, 1894 (*m*).

§ 1183. When a skilled labourer, artisan, or artist enters into an engagement with an employer to work in the art which he practises, he impliedly warrants that he possesses skill reasonably competent to the task he undertakes. Thus, if an apothecary, a surveyor, a watchmaker, a cook, an auctioneer (*n*), or a solicitor, be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. No express promise or representation

(*g*) See 38 & 39 V. c. 90, s. 10; and 43 & 44 V. c. 42, s. 8

(*h*) *Morgan* v. *London General Omnibus Co.*, (1884) 12 Q. B. D. 203; 53 L. J. Q. B. 352.

(*i*) *Cook* v. *North Metropolitan Tramways Co.*, (1887) 18 Q. B. D. 683; 53 L. J. Q. B. 309.

(*k*) *Bound* v. *Lawrence*, [1892] 1 Q. B. 226; 61 L. J. M. C. 21.

(*l*) 6 Ed. 7, c. 58.

(*m*) 57 & 58 V. c. 60, s. 548, enacts, that " (1) In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing of the ship for sea, or the sending of the ship to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the voyage: (2) Nothing in this section (*a*) shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the sending of the ship to sea was reasonable and justifiable; or (*b*) shall apply to any ship employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession." This section apparently makes the burden of proof of seaworthiness rest on the shipowner, and obliges him to show that he has used " all reasonable means to insure the seaworthiness of the ship."

(*n*) *Kavanagh* v. *Cuthbert*, (1874) I. R., 9 C. L. 136.

is necessary, for the public profession of an art is in itself a representation and undertaking to all the world that the professor possesses the requisite ability and knowledge (*o*). It follows from this rule, that if the party employed proves to be incompetent, he may, though engaged for a term, be immediately discharged (*p*), and his employer may also proceed against him for any loss occasioned by his ignorance or incapacity (*q*).

§ 1184. In all contracts to perform personal services,—as, for instance, in a covenant by an apprentice to serve his master for a certain period,—however absolute and unconditional may be the terms employed, the law implies an exception in the event of the contractor becoming disabled by the act of God, as by death or permanent illness, from doing what he has undertaken to do (*r*). So, the service of a farm-bailiff will impliedly terminate on the death of his master, unless a special stipulation to the contrary be inserted in the contract (*s*). So, an undertaking by an author to write a book, by an artist to paint a picture, or by a musician to play at a concert, is subject to an implied condition that non-fulfilment of the engagement caused by illness shall not be regarded as a breach of the contract (*t*).

§ 1185. When a man makes a contract as agent for another person, the law implies a warranty on his part that he has authority to bind his principal; and if it turns out that he really has no such authority as he claims to have, he may be sued for the damages occasioned by this breach of warranty, though he may have acted under the *bonâ fide* belief that he was authorised as agent to make the contract (*u*). Thus, when a broker applied to the Bank of England for a power of attorney for the sale of consols believing himself to be instructed by the stockholder, and *bonâ fide* induced the Bank to transfer the consols to a purchaser upon a power of attorney to which the stockholder's signature was forged, it was held that the broker must be taken to have given an implied warranty of his authority, and was liable to

(*o*) *Harmer* v. *Cornelius*, (1858) 28 L. J. C. P. 88; 5 C. B. (N.S.) 246; 116 R. R. 654.

(*p*) *Id.*

(*q*) *Jenkins* v. *Betham*, (1854) 15 C. B. 188; 24 L. J. C. P. 94; 100 R. R. 297.

(*r*) *Boast* v. *Firth*, (1868) L. R. 4 C. P. 1; 38 L. J. C. P. 1.

(*s*) *Farrow* v. *Wilson*, (1869) L. R. 4 C. P. 744; 28 L. J. C. P. 326.

(*t*) *Robinson* v. *Davison*, (1871) L. R. 6 Ex. 269; 40 L. J. Ex. 172.

(*u*) *West London Com. Bk.* v. *Kitson*, (1884) 13 Q. B. D. 360; 53 L. J. Q. B. 218; *Collen* v. *Wright*, (1857) 27 L. J. Q. B. 215; 8 E. & B. 647; 112 R. R. 728; *Richardson* v. *Williamson*, (1871) L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; *Weeks* v. *Propert*, (1873) L. R. 8 C. P. 427; 42 L. J. C. P. 129; *Randell* v. *Trimen*, (1856) 18 C. B. 786; 25 L. J. C. P. 307; 107 R. R. 516; *Simons* v. *Patchett*, (1857) 26 L. J. Q. B. 195; 7 E. & B. 568; 110 R. R. 730. See *Worthington* v. *Sudlow*, (1862) 31 L. J. Q. B. 131; *Maxwell* v. *Parnell*, (1867) I. R. 1 C. L. 234.

indemnify the Bank against the claim of the stockholder for restitution (*v*).

§ 1185A. A similar warranty arises where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (whether such other person be acting as an agent or on his own behalf), and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties. In such cases the requesting party is deemed to warrant the existence of the assumed facts which are treated as calling for the exercise of the duty, and the law implies a contract by him to indemnify the person having the duty against any liability which may result from such exercise of the supposed duty; and it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it (*x*).

§ 1186. When goods are deposited as security for the repayment of a loan on a certain day, the law implies from the nature of the transaction that the pawnee shall have power to sell the goods in default of payment at the stipulated period (*y*). But it must be carefully remembered that this doctrine is inapplicable to a case, where a man holds another person's goods on a simple claim of lien; for a lien, unlike a pledge, gives only a right of retention (*z*); and if the goods detained be sold, though it be to meet current expenses, the lien,—except in the case of an innkeeper who now enjoys to a limited extent a statutable right of sale (*a*),—is thereby effectually destroyed (*b*).

§ 1187. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract; for otherwise, it would not

(*v*) *Starkey* v. *Bank of England*, [1903] A.C. 114; 72 L. J. Ch. 402; see *Yonge* v. *Toynbee*, [1910] 1 K. B. 215; 79 L. J. Q. B. 208; *Simmons* v. *Liberal Opinion*, [1911] 1 K. B. 966; 80 L. J. K. B. 617; *Fernée* v. *Gorlitz*, [1915] 1 Ch. 179; 84 L. J. Ch. 404.

(*x*) *Starkey* v. *Bank of England*, *supra*; *Sheffield Corporation* v. *Barclay*, [1905] A. C. 392; 74 L. J. K. B. 747; *Moel Try van Ship Co.* v. *Kruger*, [1907] 1 K. B. 809; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208; 77 L. J. K. B. 889.

(*y*) *Pigot* v. *Cubley*, (1864) 15 C. B. (N.S.) 701; 33 L. J. C. P. 134; 137 R. R. 725; *Johnson* v. *Stear*, (1863) 15 C. B. (N.S.) 330; 137 R. R. 532; *Pothonier* v. *Dawson*, (1816) Holt, N. P. R. 383; 17 R. R. 647. The Bankruptcy Act, 1914 (4 & 5 G. 5, c. 59), s. 59; re-enacting s. 16 of the Bankruptcy Act, 1913, to the same effect, imposes a restriction upon this right where a receiving order has been made against the pledgor before the pledgee has exercised his right.

(*z*) See *Donald* v. *Suckling*, (1866) 35 L. J. Q. B. 232; 7 B. & S. 783; and *Halliday* v. *Holgate*, (1868) L. R. 3 Ex. 299; 37 L. J. Ex. 174.

(*a*) 41 & 42 V. c. 38.

(*b*) *Mulliner* v. *Florence*, (1878) 3 Q. B. D. 484; 47 L. J. Q. B. 700.

go to interpret and explain, but to contradict, what is written (*c*). In order to establish an inconsistency between the written agreement and the custom, it is not necessary that the former should in express terms exclude the latter; but if it can clearly be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by the custom, no evidence respecting it can be received (*d*). For instance, suppose the custom of the country should require the tenant to plough, sow, and manure a certain portion of the demised land in the last year, and should entitle him, on quitting, to receive from the landlord a reasonable compensation for his labour, seeds, and manure; evidence of such a custom would be rejected, had the tenant covenanted to plough, sow, and manure, in accordance with the custom, he being paid on quitting for the ploughing; because here the principle, "*expressum facit cessare, tacitum*," would apply, and the language of the lease would be deemed equivalent to a stipulation, that the lessor should pay for the ploughing, and no more (*e*).

§ 1188. In order to constitute such a custom or *usage of trade or business* as will be admissible in evidence to explain the terms of a written instrument, it is not necessary that it should have been immemorial, or even established for a considerable period, or uniform, or capable of being defined with precision and accuracy (*f*). Thus, "the custom of the country" with reference to good husbandry, means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie (*g*); and the general usage of trade may be imported into a contract, though proof has been given of exceptions to such usage (*h*). So, although a particular branch of trade has been only established for a year or two, parties connected with that trade will be presumed to have contracted with reference to the usages generally adopted since its existence (*i*). But, in all these cases it is the fact of a general usage or practice prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence and unless

(*c*) *Holding* v. *Pigott*, (1831) 7 Bing. 465, 474; 9 L. J. (O.S.) C. P. 125; *Clarke* v. *Roystone*, (1845) 13 M. & W. 752; 14 L. J. Ex. 143; 67 R. R. 836; *Yates* v. *Pym*, (1816) 6 Taunt. 446; 16 R. R. 653; *Trueman* v. *Loder*, (1840) 11 A. & E. 589; 9 L. J. Q. B. 165; 52 R. R. 451; *Muncey* v. *Dennis*, (1856) 1 H. & N. 216; 26 L. J. Ex. 66; 108 R. R. 531; *Suse* v. *Pompe*, (1860) 8 C. B. (N.S.) 538; 30 L. J. C. P. 75; 125 R. R. 774. See *Buckle* v. *Knoop*, (1867) 36 L. J. Ex. 49.

(*d*) *Hutton* v. *Warren*, (1836) 1 M. & W. 477; 5 L. J. Ex. 234; 46 R. R. 368, per Parke, B. See *Clarke* v. *Roystone*, *supra*.

(*e*) *Hutton* v. *Warren*, *supra*; *Webb* v. *Plummer*, (1819) 2 B. & Ald. 746; 21 R. R. 479.

(*f*) *Juggomohun Ghose* v. *Manickchund*, (1859) 7 Moore Ind. App. 263, 282.

(*g*) *Legh* v. *Hewitt*, (1803) 4 East, 154, 159; 7 R. R. 545; *Dalby* v. *Hirst*, (1819) 1 Br. & B. 224, 227, 228; 21 R. R. 577. See *ante*, § 318.

(*h*) *Vallance* v. *Dewar*, (1808) 1 Camp. 508; 10 R. R. 738.

(*i*) *Noble* v. *Kennoway*, (1780) 2 Doug. 513; *Robertson* v. *Jackson*, (1845) 2 C. B. 412; 15 L. J. C. P. 28; 69 R. R. 490.

the witnesses can state instances of the usage as having occurred within their own knowledge, their testimony will seldom be entitled to much weight. A custom of trade, however, by which goods are left in the possession of persons to whom they do not belong, to affect persons who know nothing of the custom and do not deal in the particular market must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, and not merely to persons dealing in the market in which the custom applies (*k*).

§ 1189. Whenever evidence of usage is adduced, whether it be for the purpose of explaining the technical language of an instrument, or of annexing incidents to it, the party against whom it is offered is always at liberty to prove,—either first, the non-existence of the usage,—or secondly, its illegality or unreasonableness,—or thirdly, that, in fact, it formed no part of the agreement between the parties (*l*). Indeed, "a party may properly . . . anticipate objections, and introduce evidence of this sort, which, if he delayed to produce at that moment, would afterwards be shut out" (*m*).

§ 1190. Much injustice is, it is feared, frequently occasioned by a lax habit of admitting evidence of usage, which, though ostensibly received for the purpose of explaining a written contract or other instrument, has too often the effect of putting a construction upon it which was never contemplated by the parties themselves, and which is utterly at variance with their real intentions. In this view some of the highest legal authorities both in England and America concur. The judges of the old Court of Exchequer once so said (*n*), and the same opinion was expressed more than once by the old Court of Queen's Bench (*o*). Moreover, the expediency of the rule itself was questioned in a judgment of Lord Denman in the last-named court (*p*). In America, Mr. Justice Story expressed similar views (*q*).

§ 1193. Besides the evidence of usage, strictly so called, it seems that where a written agreement is expressed in short and incomplete terms, or contains words of indeterminate signification, witnesses,

(*k*) *In re Goetz, Jonas and Co.*, [1898] 1 Q. B. 787; 67 L. J. Q. B. 577.

(*l*) *Bourne* v. *Gatliffe*, (1841) 3 Man. & G. 684; 44 R. R. 720; *Bottomley* v. *Forbes*, (1838) 5 Bing. N. C. 127; 8 L. J. C. P. 85; 50 R. R. 629. See *Fawkes* v. *Lamb*, (1862) 31 L. J. Q. B. 98; 136 R. R. 846.

(*m*) *Bourne* v. *Gatliffe*, (1844) 11 Cl. & F. 45; 44 R. R. 723; per Lord Brougham.

(*n*) See *Hutton* v. *Warren*, *supra*. See also *Anderson* v. *Pitcher*, (1800) 2 Bos. & P. 164; 5 R. R. 565.

(*o*) *Johnston* v. *Usborne*, (1840) 11 A. & E. 549; 52 R. R. 445; *Trueman* v. *Loder*, (1840) 11 A. & E. 600; 9 L. J. Q. B. 165; 52 R. R. 451.

(*p*) *Trueman* v. *Loder*, *supra*.

(*q*) *The Schooner Reeside*, (1837) 2 Sumn. 567.

present at the time of making the agreement, may be called to explain that which is per se unintelligible; such explanation not being inconsistent with the written terms (*r*). On one or two occasions, even conversations between the parties when the contract was being made, have been received, in proof of the sense which they attached to the ambiguous expressions (*s*). The principle, however, of these cases is not very clear, and no great weight should, in prudence, be attached to them (*t*).

§ 1194. Passing now to the consideration of the second description of evidence, which is admissible in explanation of written instruments, it may be laid down as a broad and distinct rule of law, that extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received (*u*). On the question "parcel or no parcel" as to the subject-matter of a contract, all the negotiations, verbal and written, leading up to the contract may be referred to (*v*). Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter (*x*). With this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instrument (*y*). In the

(*r*) *Sweet* v. *Lee*, (1841) 3 Man. & G. 452, 460; 60 R. R. 546; as, for instance, to show who are meant by "S. and others" in an agreement: *Herring* v. *Boston Iron Co.*, (1854) 1 Gray (Mass.) 134 (Am.).

(*s*) *Birch* v. *Depeyster*, (1816) 1 Stark. 210; *Gray* v. *Harper*, (1841) 1 Story, 574 (Am.); *Selden* v. *Williams*, (1839) 9 Watts, 9 (Am.).

(*t*) See *Smith* v. *Jeffryes*, (1846) 15 M. & W. 561; 15 L. J. Ex. 325; 71 R. R. 761.

(*u*) *Charrington* v. *Wooder*, [1914] A. C. 71; 83 L. J. Q. B. 220; *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; *Grahame* v. *Grahame*, (1887) 19 L. R. Ir. 249. Accordingly parol evidence may be admitted to show that a mortgage was only intended to stand as a security for certain moneys. See *Trench* v. *Doran*, (1887) 20 L. R. Ir. 338; *Doe* v. *Hiscocks*, (1839) 5 M. & W. 367; 9 L. J. Ex. 27; 52 R. R. 748; *Shore* v. *Wilson*, (1842) 9 Cl. & F. 556; 57 R. R. 2; per Parke, B.; Wigr. Wills, 65; *Doe* v. *Martin*, (1833) 4 B. & Ad. 771, 785, 786, per Parke, J.; *R.* v. *Wooldale*, (1844) 6 Q. B. 549, 565; 14 L. J. M. C. 13. See *Macdonald* v. *Longbottom*, (1860) 1 E. & E. 977; 28 L. J. Q. B. 293; 117 R. R. 556; *Mumford* v. *Gething*, (1859) 7 C. B. (N.S.) 305; 29 L. J. C. P. 105; 121 R. R. 501; *Chambers* v. *Kelly*, (1873) I. R. 7 C. L. 231; *McCollin* v. *Gilpin*, (1881) 6 Q. B. D. 516.

(*v*) *Gordon-Cumming* v. *Holdsworth*, [1910] A. C. 537; 80 L. J. P. C. 47.

(*x*) *Shore* v. *Wilson*, (1842) 9 Cl. & F. 556; *Doe* v. *Martin*, (1833) 1 N. & M. 524; *Guy* v. *Sharpe*, (1833) 1 Myl. & K. 602, Wigr. Wills 88.

(*y*) *Sweet* v. *Lee*, *supra*; *Att.-Gen.* v. *Drummond*, (1842) 1 Dr. & W. 367; *Drummond* v. *Att.-Gen.*, (1842) 2 H. L. C. 862; 81 R. R. 433; *Att.-Gen.* v. *Earl of Powis*, (1853) 1 Kay 207; 101 R. R. 571; *King's Coll. Hospital* v *Wheildon*, (1854) 18 Beav. 30; 23 L. J. Ch. 537; 104 R. R. 362; *Blundell* v. *Gladstone*, (1843) 1 Phill. 282; 12 L. J. Ch. 225; 73 R. R. 257; *Simpson* v. *Margitson*, (1847) 11 Q. B. 32; 17 L. J. Q. B. 81; 75 R. R. 278; *Roden* v. *London Small Arms Co.*, (1877) 46 L. J. Q. B. 213.

simplest case that can be put, namely, that of an instrument appearing on its face to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If an estate be conveyed by the designation of Blackacre, parol evidence must be admitted to show what property is known by that name (*z*); and if a testator devise a house purchased of A., or a farm in the occupation of B., it must be shown by extrinsic evidence what house was purchased of A., or what farm was in B.'s occupation, before it can be shown what is devised (*a*).

§ 1195. Again, to put an instance somewhat more complex, if the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings, or circumstances; or if the terms be vague and general, or have divers meanings; parol evidence will always be admissible of any extrinsic circumstances tending to show what person or persons (*b*), or what things, were intended by the party, or to ascertain his meaning in any other respect. Thus, where a testatrix bequeathed a sum of money to another "for the charitable purposes agreed upon between us," evidence was admitted to show what the purposes agreed upon were (*c*). So, also, if the court has to determine whether a bequest of stock is specific or pecuniary, it will not only look to the context of the will, and the terms of the gift, as compared with those of the other bequests, but it will also receive evidence of the state of the testator's funded property (*d*). So, where a man had assigned all his household goods, and the deed stated that the particulars were set forth in an inventory annexed, the fact of no inventory being found was held not to invalidate the deed, but extrinsic evidence was admitted for the purpose of identifying the chattels (*e*). So, where a testator had directed in his will that all moneys which he had advanced or might advance to his children, "as will appear in a statement in my handwriting," should be brought into hotchpot, the court admitted extrinsic evidence of the nature

(*z*) *Ricketts* v. *Turquand*, (1848) 1 H. L. C. 472.

(*a*) *Sanford* v. *Raikes*, (1816) 1 Mer. 653, per Sir W. Grant; *Clayton* v. *Ld. Nugent*, (1844) 13 M. & W. 207; 13 L. J. Ex. 363; 67 R. R. 560, per Rolfe, B.

(*b*) See *Grant* v. *Grant*, (1870) L. R. 2 P. & D. 8; L. R. 5 C. P. 727; 39 L. J. P. & M. 17; 39 L. J. C. P. 140; 272.

(*c*) *In re Huxtable*, [1902] 2 Ch. 793; 71 L. J. Ch. 876; *In re Fleetwood*, (1880) 15 Ch. D. 594; 49 L. J. Ch. 514. But see *In re Hetley*, [1902] 2 Ch. 866; 71 L. J. Ch. 769, where Joyce, J., held that a power of appointment given by a testator to his wife to dispose of his estate by her will, or in her lifetime "in accordance with my wishes verbally expressed by me to her," was void for uncertainty, and parol evidence was inadmissible to show what the verbally expressed wishes were.

(*d*) *Att.-Gen.* v. *Grote*, (1827) 2 Russ. & Myl. 699; 34 R. R. 183; *Boys* v. *Williams*, (1831) 2 Russ. & Myl. 689; 34 R. R. 178; *Horwood* v. *Griffith*, (1854) 23 L. J. Ch. 465; 4 De G. M. & G. 700; 102 R. R. 340.

(*e*) *England* v. *Downs*, (1840) 2 Beav. 523, 536; 9 L. J. Ch. 313; 50 R. R. 268. But now see the Bills of Sale Act, 1882 (45 & 46 V. c. 42), s. 4.

and amount of the advances and to identify and incorporate with the will documents therein referred to which can be proved to have been in existence at the date of the will (*f*). So, parol evidence is admissible to identify an imperfectly executed testamentary paper, if the object be to incorporate that document with a duly-attested codicil, which refers in general terms to the testator's "last will" (*g*).

§ 1196. In the case of *Goblet* v. *Beechey* (*h*), the controversy turned on the word "mod," as used in the following codicil of the distinguished sculptor, Nollekens. "In case of my death all the marble in the yard, the tools in the shop, bankers, mod tools for carving," &c., "shall be the property of Alex. Goblet." The plaintiff contended that the word meant "models"; the defendant, who was the executor, urged that either it was an abbreviation for "moulds," or that it should be read in connexion with the words which immediately followed it, and meant "modelling tools for carving." On the one hand, it was proved, that the legatee had been in the testator's service for thirty years, and was highly esteemed by him as one of his best workmen; and statuaries were called to prove that no such tools were known as modelling tools for carving, but that the word "mod" would be understood by any sculptor as a simple abbreviation of the word models. On the other hand, the executor showed that the testator's models were rare and curious works of art, which had sold for a large sum, but that all the other articles mentioned in the codicil were of trifling value; and he further gave in evidence, that the testator had a great number of moulds in his possession, which were not specifically disposed of by the will. Reading the codicil by the light of this extrinsic evidence, Vice-Chancellor Shadwell came to a decision that the word in question sufficiently described the testator's models; and although this decree was subsequently reversed by Lord Brougham, the reversal rested, not on the inadmissibility of any portion of the evidence, but on the ground that the models had been distinctly bequeathed by the will to another party, and that the meaning of the codicil was involved in too much obscurity to justify its operating as a revocation of the prior bequest (*i*). In another case (*k*), a testator had bequeathed to his two children the several sums of i.x.x. and o.x.x. These marks standing alone were obviously unintelligible; but the court allowed them to be explained by extrinsic evidence, showing that the deceased, when alive, had, in his business

(*f*) *Smith* v. *Conder*, (1878) 9 Ch. D. 170; 47 L. J. Ch. 878; *Whateley* v. *Spooner*, (1857) 3 K. & J. 542; 112 R. R. 285.

(*g*) *Allen* v. *Maddock*, (1858) 11 Moore P. C. 427; 117 R. R. 62; *In re Almosnino*, (1860) 29 L. J. P. & M. 46; 1 Sw. & Tr. 508; *ante*, § 1061.

(*h*) (1829) 3 Sim. 24; 9 L. J. (O.S.) Ch. 200.

(*i*) (1831) 2 Russ. & Myl. 624.

(*k*) *Kell* v. *Charmer*, (1856) 23 Beav. 195; 113 R. R. 93.

of a jeweller, used the symbols as denoting respectively £100 and £200.

§ 1197. In many other cases of testamentary dispositions, one construction would be given to particular words, if children were living at the time the will was executed; and another construction, if no child was alive at that period; and here it is obvious, that unless the court were first made acquainted with the circumstances surrounding the testator, it could not with safety undertake to construe the will (*l*). So, if a man were to make a settlement for his children, which was involved in some ambiguity, it might be impossible for the court to solve the doubt, until evidence had been adduced respecting the state of the family of the settlor, and the circumstances in which he was placed in relation to the property dealt with (*m*). So, where an estate, a house, a mill, a factory, or a farm, has been conveyed or devised eo nomine, and the question is as to what was part and parcel thereof, and so passed by the deed or will, parol evidence showing the situation and limits of the property, the manner in which it was acquired, or occupied, and the like, will be always admissible (*n*). So, if the language of a guarantee leaves it doubtful whether the consideration mentioned therein be a past or present consideration, and, consequently, whether the instrument be invalid or valid, parol evidence of the circumstances under which it was given will be received to explain the ambiguity (*o*); and perhaps, in such a case, the court, without the aid of any extrinsic proof, would now in the first instance adopt that construction which would support the validity of the instrument, and would cast upon the party objecting to the guarantee the burthen of producing evidence to show that it was void (*p*).

§ 1198. It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence,

(*l*) Per Sugden, C., in *Att.-Gen.* v. *Drummond*, (1842) 1 Dr. & W. 367.

(*m*) *Id.*

(*n*) *Doe* v. *Martin*, (1833) 4 B. & Ad. 785; *Doe* v. *Burt*, (1787) 1 T. R. 704; 1 R. R. 367; *Castle* v. *Fox*, (1871) L. R. 11 Eq. 542; 40 L. J. Ch. 302; *Webb* v. *Byng*, (1855) 1 K. & J. 580; 103 R. R. 249; *Doe* v. *Ld. Jersey*, (1825) 3 B. & C. 870; 19 R. R. 380; *Okeden* v. *Clifden*, (1826) 2 Russ. 309; *Ropps* v. *Barker*, (1826) 4 Pick. 239; *Farrar* v. *Stackpole*, (1829) 6 Greenl. 154.

(*o*) *Goldshede* v. *Swan*, (1847) 1 Ex. 154; 16 L. J. Ex. 284; 74 R. R. 623, and cases there cited; *Edwards* v. *Jevons*, (1849) 8 C. B. 436; 19 L. J. C. P. 50; 79 R. R. 559; *Colbourn* v. *Dawson*, (1851) 10 C. B. 765; 20 L. J. C. P. 154; *Bainbridge* v. *Wade*, (1850) 16 Q. B. 89; 20 L. J. Q. B. 7; 83 R. R. 393; *Hoad* v. *Grace*, (1862) 31 L. J. Ex. 98; 7 H & N. 494; 126 R. R. 537; *Wood* v. *Priestner*, (1866) 4 H. & C. 681; 36 L. J. Ex. 42; 143 R. R. 848; *Heffield* v. *Meadows*, (1869) L. R. 4 C. P. 595.

(*p*) *Steele* v. *Hoe*, (1849) 14 Q. B. 431; 19 L. J. Q. B. 89; *Broom* v. *Batchelor*, (1856) 1 H. & N. 255; 25 L. J. Ex. 299; 108 R. R. 555. See *Mare* v. *Charles*, (1856) 5 E. & B. 978; 25 L. J. Q. B. 119; 103 R. R. 831, and also, 19 & 20 V. c. 97, s. 3, cited *ante*, § 1030.

the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is, not to vary the language employed, but merely to explain the sense in which the writer understood it. Thus, a contract or other instrument, which *prima facie* would seem to have created a joint-tenancy between two persons, may be construed as having established a tenancy in common, if it can be shown, not indeed by parol testimony of intention, but by evidence of the acts and dealings of the parties, and of the surrounding circumstances, that this last construction is that which the instrument was originally intended to bear (*q*). Where certain premises were leased, including a yard described by metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease (*r*). So, where a testator had devised, in 1804, "all his lands in the parish of Doynton," to his daughter, and it appeared that he had a farm, which at that date was generally reputed to be wholly in Doynton, but which subsequently turned out to be partly in another parish, the Court of Exchequer rightly held that the entire farm passed under the will (*s*). So, where a fine had been levied for twenty acres of land and twelve messuages in Chelsea, evidence was admitted to show that, though the conusor's estate at Chelsea was under twenty acres, he had nineteen houses on it; and as, read in connexion with these facts, the language of the fine was ambiguous, further proof was received as to what particular part of the property was intended to be included in it (*t*).

§ 1199. Again, an estate was devised to Mary Beynon's three daughters, Mary, Elizabeth, and Ann. At the date of the will, Mary Beynon had two legitimate daughters, namely, Mary and Ann, and a younger illegitimate child, named Elizabeth. Thus, two persons only were in existence, who correctly answered the description in the devise; yet still Elizabeth, the illegitimate daughter, might have been included therein, had it clearly appeared that the testator so intended. In order, however, to rebut her claim, extrinsic evidence was admitted, which showed that Mary Beynon had formerly had a legitimate daughter named Elizabeth, who was born in the order stated in the will; and that, though this daughter had died several years before

(*q*) *Harrison* v. *Barton*, (1861) 30 L. J. Ch. 213.
(*r*) 2 Poth. Obl. 185; *Doe* v. *Burt*, (1787) 1 T. R. 701; 1 R. R. 367.
(*s*) *Anstee* v. *Nelms*, (1853) 1 H. & N. 225; 26 L. J. Ex. 5; 108 R. R. 536.
(*t*) *Doe* v. *Wilford*, (1824) 1 C. & P. 284; *Denn* v. *Wilford*, (1826) 2 C. & P. 173; 4 L. J. (O.S.) K. B. 295.

the date of the will, her death was unknown to the testator, who had also been studiously kept in ignorance of the birth of the natural child; and under these circumstances the jury were held to have rightly decided, that the illegitimate daughter Elizabeth was not entitled to the devise in question (*u*).

§ 1200. So, also, if an order of removal has been quashed generally by the Sessions, the removing parish, on the trial of an appeal against a subsequent order of removal, may show by parol evidence the state of things when the first order was quashed, and that the Sessions in quashing it intended to pronounce no decision on the merits of the settlement (*v*). For although an order of Sessions quashing an order of removal is *primâ facie* evidence, that the pauper was not settled in the appellant parish (*x*),—yet, as the decision may have proceeded, either on that ground, or on the ground that the pauper was then not chargeable, or was irremovable, and as the language of the order of Sessions is consistent with any one of these hypotheses, it must be competent for the respondents to prove the particular ground on which the decision rested (*y*). So, where it was a condition precedent to the jurisdiction of a police magistrate to deal with a particular offence that the competent military authority should have first investigated the case and determined that the offence was of such a character that it could adequately be dealt with by a Court of Summary Jurisdiction, and a certificate signed by the competent military authority was produced, which was in due form, save that it did not clearly appear on the face of the certificate that "the case" to which it referred was identical with the offence stated on the charge sheet, it was held that parol evidence (*e.g.*, that of a police officer) was admissible to prove that the offence stated on the charge sheet was the identical offence which had been investigated by the competent military authority (*z*).

§ 1201. But although evidence of all the circumstances, which surrounded the author of a written instrument, will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the language of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted, with the view of setting up an inten-

(*u*) *Doe* v. *Beynon*, (1840) 12 A. & E. 431; 9 L. J. Q. B. 359; 54 R. R. 592; *Phillips* v. *Barker*, (1854) 1 Sm. & G. 583; 23 L. J. Ch. 44; 96 R. R. 496.

(*v*) *R.* v. *Wick St. Lawrence*, (1833) 5 B. & Ad. 526, 537; 3 L. J. K. B. 12; *R.* v. *Wheelock*, (1826) 5 B. & C. 511; *R.* v. *Perranzabuloe*, (1844) 3 Q. B. 400, 402; 13 L. J. M. C. 47; *R.* v. *Flintshire*, (1844) 2 Dowl. & L. 143; 13 L. J. M. C. 163.

(*x*) *R.* v. *Wick St. Lawrence*; *R.* v. *Yeoveley*, (1838) 8 A. & E. 818; 8 L. J. M. C. 9.

(*y*) *R.* v. *Wick St. Lawrence.*

(*z*) *R.* v. *Mead*, [1918] 2 K. B. 866; 88 L. J. K. B. 98.

tion inconsistent with the plain meaning of the writing itself (*a*). For, the duty of the court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used (*b*). It is merely a duty of interpretation and construction; that is, *to find out the true sense of the written words, as the parties used them*; and, when the true sense is ascertained, to subject the instrument to the established rules of law (*c*).

§ 1202. In no case therefore,—except, as will be presently pointed out (*d*), where the description in the document would equally apply to any one of two or more subjects (*e*), or where the object is to rebut an equity (*f*),—is it permitted to explain the language of a written instrument by evidence of the private views, the secret intentions, the known principles, or even the express parol declarations of the writer; but, in all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context, and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention (*g*).

§ 1203. For instance (*h*), parol evidence has repeatedly been rejected, when tendered to show what persons a testator meant to include

(*a*) *Newenham* v. *Smith*, (1859) 10 Ir. C. L. R. 245; *Higgins* v. *Dawson*, [1902] A. C. 1; 71 L. J. Ch. 132.

(*b*) *Doe* v. *Gwillim*, (1833) 5 B. & Ad. 129; 2 L. J. K. B. 194; *Doe* v. *Martin*, (1833) 4 B. & Ad. 786; *Shore* v. *Wilson*, (1842) 9 Cl. & F. 525; 57 R. R. 2, per Coleridge, J.; 556, per Parke, B.; 566, per Tindal, C. J.; *Beaumont* v. *Field*, (1818) 2 Chit. 275; 19 R. R. 308; *Richardson* v. *Watson*, (1833) 4 B. & Ad. 800; 2 L. J. K. B. 134; 38 R. R. 366; *Rickman* v. *Carstairs*, (1833) 5 B. & Ad. 662.

(*c*) See Leiber's Legal and Polit. Hermeneutics, c. 1, § 8, and c. 3, §§ 2, 3; Doct. & Stu. 39, c. 24.

(*d*) *Post*, §§ 1206, 1227.

(*e*) *Shore* v. *Wilson*, *supra*.

(*f*) See *post*, §§ 1227—1230.

(*g*) *Shore* v. *Wilson*, *supra*; *Re Peel*, (1870) L. R. 2 P. & D. 46; 39 L. J. P. & M. 36. This case is remarkable as showing the strength of the rule. Francis *Corbet* Thorpe was a gentleman who lived at Hampton. He had a son who lived with him, and was aged 12, and named Francis *Courtenay* Thorpe. Testator appointed "Francis Courtenay Thorpe of Hampton, Gent." to be one of his executors. Lord Penzance held that the son answered the description, and excluded evidence that testator intended to appoint the father. It is thought that the decision might well have been otherwise, for whilst Francis Courtenay Thorpe undoubtedly named the boy, the description "Hampton Gent." more accurately described the father, thus raising a latent ambiguity. But the Judge thought that the description referred accurately to the boy, and that there was no ambiguity.

(*h*) For other instances, see *ante*, §§ 1155, 1156.

or exclude in employing the word "relations" (*i*); what articles he intended to give by the word "plate" (*k*), what property he thought he devised by the expression "lands out of settlement" (*l*), and the like (*m*); for in all these cases, as the legal signification of the language used was plain, it mattered not in point of law what the testator intended; the sole question being, non quod voluit, sed quod dixit (*n*). Indeed, if this were not the rule of law no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of a particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to benefit under it, might be set up to contradict or vary the plain language of the instrument itself (*o*).

§ 1203A. Though declarations of intention, except in the cases before alluded to, cannot be received in evidence to explain an ambiguity in a written instrument, yet they are not always excluded, when the question does not turn on the meaning of the language employed. For instance, if a will be lost, evidence of the testator's declarations of intention will be admissible in proof of its contents (*p*); and if the question relate to the constituent parts of an existing will, similar statements, whether oral or written, and whether made before or after it was signed, may be given in evidence to show what was or was not a part of the instrument at the time of its execution (*q*).

§ 1204. Moreover, the rule has been somewhat relaxed in order to facilitate the interpretation of *ancient writings*. Here, if the instrument be an old one, and its meaning doubtful, the acts of the author, which are only modes of expressing intention more weighty than words, may be given in evidence in aid of its construction. Thus, in

(*i*) *Goodinge* v. *Goodinge*, (1749) 1 Ves. Sen. 230; *Edge* v. *Salisbury*, (1749) Amb. 70; *Green* v. *Howard*, (1779) 1 Bro. C. C. 31. See *Sullivan* v. *Sullivan*, (1870) I. R. 4 Eq. 547, where the words were "my dearly beloved."

(*k*) *Nicholls* v. *Osborn*, (1727) 2 P. Wms. 419; *Kelly* v. *Powlett*, (1763) Amb. 605.

(*l*) *Strode* v. *Russell*, (1708) 2 Vern. 621.

(*m*) See other instances collected in Wigr. Wills, 99—105. See, also, *Doe* v. *Hubbard*, (1850) 15 Q. B. 227; 20 L. J. Q. B. 61; *Horwood* v. *Griffith*, (1854) *supra*; 23 L. J. Ch. 465; 4 De G. M. & G. 700; 102 R. R. 340; *Hicks* v. *Sallitt*, (1854) 23 L. J. Ch. 571; 98 R. R. 311; *Millard* v. *Bailey*, (1866) L. R. 1 Eq. 378; 35 L. J. Ch. 312. In *Knight* v. *Knight*, (1861) 30 L. J. Ch. 644, Stuart, V.-C., appears to have utterly ignored this rule, holding that extrinsic evidence was admissible to show that, under the words "ready money," a testator meant that shares in an insurance company should pass. *Sed qu.*

(*n*) *Shore* v. *Wilson*, *supra*.

(*o*) *Id.* 566, per Tindal, C.J.

(*p*) *Sugden* v. *Ld. St. Leonards*, (1876) 45 L. J. P. 45; 1 P. D. 154.

(*q*) *Gould* v. *Lakes*, (1880) 49 L. J. P. & M. 59; 6 P. D. 1.

the case of the *Attorney-General* v. *Brazenose College* (*r*), the House of Lords held, that proof of the application of the funds of an ancient charity by the original founder, and first trustee, was strong evidence of intention, and might be so treated by the court in construing the grant. So, in the case of the *Attorney-General* v. *Drummond* (*s*), Lord Chancellor Sugden,—while acknowledging that he could not receive evidence of the declarations of the founder of an ancient charity, either against, or in favour of, his grant,—held that he was clearly entitled to inquire as to what acts the founder had done in relation to the charity; and his lordship observed, that one of the most settled rules of law for the construction of ambiguities in ancient instruments was, that the court might resort to contemporaneous usage to ascertain the meaning of the deed. "Tell me," said he, "what you have done under such a deed, and I will tell you what that deed means" (*t*). Lord Chief Justice Tindal, also, has declared, that, for the purpose of ascertaining the sense of an old charity grant, evidence of "the early and contemporaneous application of the funds of the charity itself by the original trustees under the deed," was certainly admissible (*u*).

§ 1205. In each of the three examples given in the preceding section, the question turned on the construction of a charity grant; but as these instruments possess no peculiarity, which would warrant the adoption of a special rule of evidence with respect to them, it may be laid down as a general proposition, that *all ancient instruments* of every description may, in the event of their containing ambiguous language, but in that event alone, be interpreted by what is called contemporaneous and continuous usage under them, or in other words, by evidence of the mode in which property dealt with by them has been held and enjoyed (*v*). For instance, the contem-

(*r*) (1834) 2 Cl. & F. 295; 1 L. J. Ch. 66; 37 R. R. 107.

(*s*) (1848) 1 Dr. & W. 353, 366, 375, 376; aff. on appeal, *Drummond* v. *Att.-Gen.*, 2 H. L. C. 837; 81 R. R. 433.

(*t*) 1 Dr. & W. 368.

(*u*) *Shore* v. *Wilson*, (1842) 9 Cl. & F. 569; 57 R. R. 2; *Att.-Gen.* v. *Sidney Sussex Coll.*, (1869) L. R. 4 Ch. 722, 732; 38 L. J. Ch. 657, 659, 665; *Att.-Gen.* v. *May. of Bristol*, (1820) 2 J. & W. 121; 22 R. R. 136, per Ld. Eldon; *Van Dieman's Land Co.* v. *Marine Board of Table Cape*, [1906] A. C. 92; 75 L. J. P. C. 28. See 7 & 8 V. c. 45, s. 2, cited *ante*, § 75.

(*v*) *Weld* v. *Hornby*, (1806) 7 East, 199; 8 R. R. 608; *Waterpark* v. *Fennell*, (1859) 7 H. L. C. 650; 115 R. R. 317; *Donegall* v. *Templemore*, (1858) 9 Ir. C. L. R. 374; *D. of Devonshire* v. *Neill*, (1877) 2 L. R. Ir. Ex. 162—165, per Palles, C. B.; *Att.-Gen.* v. *Parker*, (1747) 3 Atk. 577; *R.* v. *Dulwich College*, (1851) 17 Q. B. 600; 21 L. J. Q. B. 36; *Att.-Gen.* v. *Murdoch*, (1852) 1 De. G. M. & G. 86; 21 L. J. Ch. 694; 91 R. R. 41; in *Att.-Gen.* v. *St. Cross Hospital*, (1853) 17 Beav. 435, 464, 465; 24 L. J. Ch. 793; 99 R. R. 228; Romilly, M.R., held that no presumption could be made against the clear ostensible purpose of the foundation, though it were supported by a usage of 150 years. See *Att.-Gen.* v. *Clapham*, (1854) 4 De G. M. & G. 591; 24 L. J. Ch. 177; 102 R. R. 296.

poraneous acts of occupiers of land have been admitted in evidence to explain the meaning of an ambiguous award under an old enclosure Act (*x*). So, where the question was whether the soil, or merely the herbage, passed under the term "pastura" contained in an ancient admission as entered on the court-rolls of a manor, evidence was received to show that the tenants had for a long series of years enjoyed the land itself (*y*). So, the by-laws of a corporation may be taken as an exposition of their charter (*z*); and evidence of contemporaneous, or even of constant modern (*a*), usage will be admissible, for the purpose of ascertaining the meaning and effect of an ancient grant or charter from the Crown (*b*), or of any private deed, or other instrument, of remote antiquity (*c*). So, also, when the language of an old statute is doubtful, the maxim, optimus interpres rerum usus, will be held to apply (*d*). And the principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent, as well as where it is latent. Where, therefore, in a land certificate (colonial), issued by the Crown in 1899, there was a variance between the stated acreage and the acreage necessarily contained within the stated boundaries, in litigation in 1913 evidence of user was received which led to the boundaries being rejected *as falsa demonstratio* (*e*). But a recent statute should be construed according to its own terms, and not according to the views which interested parties may have taken (*f*).

(*x*) *Wadley* v. *Baylis*, (1814) 5 Taunt. 752; 15 R. R. 645; recognised by Cresswell, J., in *Doe* v. *Beviss*, (1849) 7 C. B. 511; 18 L. J. C. P. 128; 70 R. R. 712; *Att.-Gen.* v. *Boston*, (1847) 1 De G. & Sm. 519, 527.

(*y*) *Doe* v. *Beviss*, *supra*; *Stammers* v. *Dixon*, (1806) 7 East, 200; 8 R. R. 612.

(*z*) *Davis* v. *Waddington*, (1844) 7 Man. and Gr. 44; 14 L. J. C. P. 45; 66 R. R. 659.

(*a*) *Chad.* v. *Tilsed*, (1821) 2 Br. & B. 403; 23 R. R. 477; *Doe* v. *Beviss*, *supra*; *D. of Beaufort* v. *Mayor of Swansea*, (1849) 3 Ex. 413; 77 R. R. 677; *Master Pilots and Seamen of Newcastle* v. *Bradley*, (1851) 2 E. & B. 428, n; 95 R. R. 621, n; *Shephard* v. *Payne*, (1863) 3 New R. 580.

(*b*) *May. of London* v. *Long*, (1807) 1 Camp. 22; 10 R. R. 618; *R.* v. *Varlo*, (1775) 1 Cowp. 248; *Blankley* v. *Winstanley*, (1789) 3 T. R. 279; 1 R. R. 704; *Bradley* v. *Pilots of Newcastle*, (1853) 2 E. & B. 427; 23 L. J. Q. B. 35; 95 R. R. 620; *Jenkins* v. *Harvey*, (1835) 2 Cr. M. & R. 393; 5 L. J. Ex. 17; 40 R. R. 769; *Brune* v. *Thompson*, (1843) 4 Q. B. 543; 12 L. J. Q. B. 251; 62 R. R. 430.

(*c*) *Witnell* v. *Gartham*, (1795) 6 T. R. 397, 398; 3 R. R. 218; *Weld* v. *Hornby*, *supra*; *Duke of Beaufort* v. *Mayor of Swansea*, *supra*; *Sadlier* v. *Biggs*, (1853) 4 H. L. C. 435; 94 R. R. 172; *Waterpark* v. *Fennell*, *supra*.

(*d*) *R.* v. *Scott*, (1790) 3 T. R. 604; *Sheppard* v. *Gosnold*, (1673) Vaugh. 169; *R.* v. *Abp. of Canterbury*, (1848) 18 Q. B. 581, per Coleridge, J., 627, per Patteson, J.; Montrose Peer., (1853) 1 Macq. H. L. 401.

(*e*) *Watcham* v. *A. G. of East African Protectorate*, [1919] A. C. 533; 87 L. J. P. C. 150.

(*f*) *Trustees of Clyde Navigation* v. *Laird*, (1883) 8 A. C. 658, per Lord Watson, at p. 673; *Goldsmith's Company* v. *Wyatt*, [1907] 1 K. B. 95, at p. 107; 76 L. J. K. B. 166; *Sadler* v. *Whiteman*, [1910] 1 K. B. 868, at p. 890.

§ 1206. Besides general proof of all the facts and circumstances respecting the persons or things to which the instrument relates, which is undoubtedly legitimate, and often necessary, evidence, in order to enable the court to understand the meaning and application of the language employed, the declarations of the writer of the instrument will, as before mentioned (*g*), be receivable in evidence, in a particular class of cases; namely, where extrinsic evidence has shown that a description in the instrument is alike applicable, with legal certainty, to two or more persons or things.

§ 1207. The doctrine on this subject has been explained by Lord Abinger (*h*):—" But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case (*i*), in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things (*k*), or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls ' an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity (*l*); for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."

(*g*) *Ante*, § 1202.

(*h*) *Doe* v. *Hiscocks*, (1839) 5 M. & W. 363; 9 L. J. Ex. 27; 52 R. R. 748. See *Charter* v. *Charter*, (1874) L. R. 7 H. L. 364; 43 L. J. P. & M. 73.

(*i*) As to rebutting an equity, see §§ 1227—1230.

(*k*) See *Harman* v. *Gurner*, (1866) 35 Beav. 478; 147 R. R. 268.

(*l*) See *Douglas* v. *Fellows*, (1853) 1 Kay, 114; 23 L. J. Ch. 167; 101 R. R. 527.

§ 1208. The rule thus laid down has been followed in various cases. Thus, on the one hand, where there is a devise to a relative described as being of a certain degree of relationship, it *primâ facie* means legitimate relationship; and if there exist a legitimate relation of this degree, parol evidence is not admissible to show that an illegitimate relation whose reputed relationship is of the same degree, was the person really intended (*m*). If, however, it is impossible from the circumstances of the parties that any legitimate children could take under the bequest, illegitimate children may be included (*n*). On a gift by will to "my niece E. W.," if neither the testator nor his wife possess a niece, though it may be shown that either a niece or a grandniece of the wife was meant,—and such person can claim the gift as a niece (*o*),—extrinsic evidence is not admissible to show that another but illegitimate grandniece was meant (*p*). Again, on a gift to the "children" of a donee, who has two families, all his children will take, and extrinsic evidence cannot be received to show that only the children of one family were meant, for the word children is not ambiguous (*q*). On the other hand, where a testator had devised one house "to George Gord, the son of George Gord"; another "to George Gord, the son of John Gord"; and a third, after the expiration of certain life estates, "to George Gord, the son of Gord"; evidence of his declarations was admissible to show, that the person meant to be designated by the last description was George the son of *George* Gord (*r*). So, where the devise was "to John Allen the grandson of my brother Thomas, and I charge the same with the payment of £100 to each and every the brothers and sisters of the said John Allen"; and it appeared that, at the date of the will, the testator's brother Thomas had two grandsons named John Allen, one having several brothers and sisters, and the other having one brother and one sister; the court received evidence of the declarations of the testator, to show which grandchild was intended (*s*). So, where lands were left to John Cluer, of Calcot, and two persons, father and son, were of that name, parol evidence of the testator's intention to leave

(*m*) *Dorin* v. *Dorin*, (1875) L. R. 7 H. L. 568; 43 L. J. Ch. 462; *In re Taylor*, (1887) 34 Ch. D. 255; 56 L. J. Ch. 171; *Wells* v. *Wells*, (1874) L. R. 18 Eq. 504; 43 L. J. Ch. 681; *In re Pearce*, [1914] 1 Ch. 254; 83 L. J. Ch. 266.

(*n*) See *Hill* v. *Crook*, (1873) L. R. 6 H. L. 265; 42 L. J. Ch. 702; and the cases cited in the last note.

(*o*) *In re Fish*, [1894] 2 Ch. 83; 63 L. J. Ch. 437.

(*p*) *Sherratt* v. *Montford*, (1873) L. R. 8 Ch. 298; 42 L. J. Ch. 688.

(*q*) *Andrews* v. *Andrews*, (1885) 15 L. R. Ir. 199, 211; *Dorin* v. *Dorin*, *supra*.

(*r*) *Doe* v. *Needs*, (1836) 2 M. & W. 129; 6 L. J. Ex. 59; 46 R. R. 521; this case, however, would seem in truth to have been one not of *latent* but of *patent* ambiguity; for that there were two George Gords appeared plainly on the face of the will itself. See § 1212. *Doe* v. *Morgan*, (1832) 1 Cr. & M. 235; 2 L. J. Ex. 88; 38 R. R. 611.

(*s*) *Doe* v. *Allen*, (1840) 12 A. & E. 451; 9 L. J. Q. B. 395; 54 R. R. 603; *Fleming* v. *Fleming*, (1862) 31 L. J. Ex. 419; 1 H. & C. 242; 130 R. R. 486.

them to the son, was held admissible (*t*). So, where property was devised to "William Marshall, my second cousin," and it appeared that the testator had no second cousin of that name, but that he had two first cousins once removed, one named William Marshall, and the other named William John Robert Blandford Marshall, Vice-Chancellor Page Wood admitted parol evidence to resolve this latent ambiguity (*u*).

§ 1209. Where declarations of intention are receivable in evidence, the rule most consistent with modern authorities seems to be, that their admissibility does not depend upon the *time* when they were made. Contemporaneous declarations will certainly be entitled, cæteris paribus, to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them (*v*); unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done, at the time of speaking (*x*). Neither will the admissibility of declarations rest on the manner in which they were made, or on the occasions which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will of course vary materially according to the time and circumstances (*y*). They may, of course, consist of letters; for example, letters in which a deceased insured expressed an intention of going to a certain place where a dead body, the identity of which is questioned, has been found (*z*).

§ 1210. Though declarations of intention are, as above stated, inadmissible, except for the purpose of explaining a latent ambiguity in the instrument, this rule will not preclude mere collateral statements made by the author of the instrument respecting the persons or things mentioned therein. For instance, to take the case of a will, the testator may have habitually called certain persons or things

(*t*) *Jones* v. *Newman*, (1751) 1 W. Bl. 60; explained in *Doe* v. *Hiscocks*, (1839) 5 M. & W. 370; 9 L. J. Ex. 27; 52 R. R. 748.

(*u*) *Bennett* v. *Marshall*, (1856) 2 K. & J. 740; 110 R. R. 448; *Re O'Reilly*, (1874) 43 L. J. P. & M. 5. See *Webber* v. *Corbett*, (1874) L. R. 16 Eq. 515; 43 L. J. Ch. 164.

(*v*) *Doe* v. *Allen*, *supra*, per Ld. Denman, as to *subsequent* declarations; *Doe* v. *Hiscocks*, *supra*, per Ld. Abinger, as to *previous* declarations. See, *contra*, *Thomas* v. *Thomas*, (1796) 6 T. R. 671; *Strode* v. *Russell*, (1708) 2 Vern. 625.

(*x*) *Whitaker* v. *Tatham*, (1831) 7 Bing. 628; 9 L. J. (O.S.) C. P. 189.

(*y*) *Trimmer* v. *Bayne*, (1802) 7 Ves. 518; 6 R. R. 173, per Ld. Eldon.

(*z*) *Mutual Life, &c.* v. *Hillman*, (1892) 145 N. S. 285 (Am.).

by *peculiar names*, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will (*a*). Thus, in *Lord Camoys* v. *Blundell* (*b*), where the question was, whether the second son of *Joseph* Weld, of Lulworth, was the party beneficially entitled under a devise in trust for "the second son of *Edmond* Weld, of Lulworth, Esq.," parol evidence was admitted to show that the testator had on several occasions, even after correction, called the possessor of Lulworth "Edmond."

§ 1211. The case of *Lee* v. *Pain* (*c*) affords a good illustration of this doctrine. There, a testatrix, by a codicil dated in 1836, had bequeathed "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden, £200 each." These legacies were claimed by a Mrs. Washbourne and her daughter. It appeared in evidence, that Mrs. Washbourne was the daughter of the Rev. J. Bowden, who died in 1812, and the widow of the Rev. D. Washbourne, a dissenting minister at Hammersmith. Mrs. Bowden died in 1820, since which time no person had lived at Hammersmith answering the description in the codicil. It further appeared that the testatrix, who was of great age, had been intimately acquainted with the Bowdens and the Washbournes; that she had been in the habit of calling Mrs. Washbourne by her maiden name of Bowden; and that being often reminded of the mistake, she had always acknowledged that she had confounded the two names. Under these circumstances, Vice-Chancellor Wigram decided that the claimants were entitled to their respective legacies. So, where a bequest was made to "Mrs. G.," parol evidence was admitted to show that the testator had been in the habit of calling a Mrs. Gregg, "Mrs. G." (*d*). The case of *Beaumont* v. *Fell* (*e*) carries this doctrine to its extreme limit. There, a legacy, given to Catherine Earnley, was claimed by Gertrude Yardley; and it appearing that no such person

(*a*) *Doe* v. *Hiscocks*, *supra*. See, also, *Doe* v. *Hubbard*, (1850) 15 Q. B. 227, 237; 20 L. J. Q. B. 61.

(*b*) (1848) 1 H. L. C. 786; 12 L. J. Ch. 225; 73 R. R. 257. See, also, *Mostyn* v. *Mostyn*, (1854) 23 L. J. Ch. 925; 5 H. L. C. 155; 101 R. R. 100.

(*c*) (1844) 4 Hare, 251—253; 14 L. J. Ch. 346; 67 R. R. 41. See, also, *R.* v. *Wooldale*, (1845) 6 Q. B. 549.

(*d*) *Abbott* v. *Massie*, (1796) 3 Ves. 148; 3 R. R. 79; explained by Rolfe, B., in *Clayton* v. *Ld. Nugent*, (1844) 13 M. & W. 204, 207; 13 L. J. Ex. 363; 67 R. R. 560. See, also, *In the goods of François de Rosaz*, (1877) 46 L. J. P. & M. 6; 2 P. D. 66.

(*e*) (1723) 2 P. Wms. 141. In this case declarations of the testator were admitted, but the propriety of receiving such evidence has been strongly questioned by Ld. Abinger in *Doe* v. *Hiscocks*, (1839) 5 M. & W. 371; 9 L. J. Ex. 27; 52 R. R. 748; and the case, as an authority on that point, may be considered overruled.

was known as Catherine Earnley, proof was received that the testator usually called the claimant Gatty, which might easily have been mistaken by the scrivener who drew the will for Katy, and the court, acting on this, and on other evidence of a like nature, was perhaps justified in deciding in favour of the claimant.

§ 1211A. So, also, where no one answers to the description of a legatee given by a testator in his will, former wills made by him are admissible in evidence to show his knowledge and state of mind at the time, and so to identify the intended legatee. Thus, where a testator gave legacies to "such of the daughters of my late friend Ignatius Scoles, deceased, as shall be living and married at my decease," and it appeared that Ignatius Scoles was living at the date of the will and had never been married, and was to the testator's knowledge, a Jesuit priest, and therefore could not marry, but that his father, J. J. Scoles (who the testator might have known was dead at the date of the will), had left several daughters intimately known to the testator, a former will of the testator, by which he left legacies to the daughters of J. J. Scoles by name, describing them as the daughters of the late Mr. Scoles, was admitted in evidence to prove that they were the intended legatees (*f*). So, also, where a testator misdescribed certain railway stock held by him, evidence of former wills made by him was admitted to explain what stock he intended by his will (*g*).

§ 1212. This rule, by which the admissibility of declarations of intention is governed, largely turns upon a distinction, which has been recognised since the days of Lord Bacon, as subsisting between *latent* and *patent* ambiguities. The leading doctrine on this subject is thus given by that great lawyer:—"*Ambiguitas verborum latens, verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur*" (*h*). Upon which he remarks, that "There be two sorts of ambiguities of words, the one is ambiguitas patens, and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to

(*f*) *In re Waller*, (1899) 68 L. J. Ch. 526.
(*g*) *In re Smith*, (1904) 20 Times L. R. 287.
(*h*) Bacon's Maxims, Reg. 23.

pass without deed, which the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hæredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited." "But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was, that the party intended should pass" (*i*).

§ 1213. So far as patent ambiguities are concerned, Lord Bacon expounds the law with sufficient precision; for no doubt can be entertained that when the ambiguity is *patent*, all declarations of the writer's intention will be uniformly excluded (*k*). If, therefore, a testator, after leaving specific legacies to his several children, were to bequeath the residue to his child, not specifying which, the will, so far as regarded the residuary bequest, would be inoperative and void. So, where Sir Gilbert East indulged the strange caprice of leaving his property to persons whom he designated by the letters of the alphabet, stating at the end of his will that the key to the initials was in his writing desk on a card: the intended objects of his bounty were defeated by his next-of-kin, no card being found of as old date as the will. A card, indeed, was discovered, which would have furnished a key had it been admissible; but as it was dated many years after the execution of the will, it could only be regarded as a declaration of the testator; and, the case being one of patent ambiguity, the court held, in conformity with all the authorities on the subject, that this species of evidence could not be legally admitted (*l*).

§ 1214. The law as to latent ambiguities is not so easily intelligible. It is especially necessary to guard against the supposition, that, because no ambiguity arises on the face of the instrument, any doubt which is occasioned by the introduction of extrinsic evidence, may be cleared up by having recourse to the declarations of the writer's intention. This is not the law; and many instances of strictly latent ambiguities might be given, where evidence of declarations of intention would be inadmissible. For, in the first place, a will, apparently plain and intelligible, may, when an inquiry is instituted respecting the persons or things to which it relates, turn out to be uncertain; that is, the persons or things may prove not to have been described

(*i*) See Bacon's Law Tracts, 99, 100.

(*k*) See, however, note to § 1208.

(*l*) *Clayton* v. *Ld. Nugent*, *supra*. See *Kell* v. *Charmer*, (1856) 23 Beav. 195; 113 R. R. 93; cited *ante*, § 1196; and see, also, *Whateley* v. *Spooner*, (1857) 3 K. & J. 542; 112 R. R. 285; cited *ante*, § 1195.

with *legal certainty*. Suppose a bequest be made to the *four* children of A., and it appears that A. had *six* children, two by a first marriage, and the remainder by a second. Here, though evidence of the circumstances of the family, and of the respective ages of the children, would no doubt be admissible, with the view of identifying the particular legatees alluded to in the will, it seems that proof of the testator's declarations of intention could not be received (*m*).

§ 1215. Secondly, a legatee may be so described in a will, that *while part of the description answers to one claimant, the remainder may apply to another* (*n*). Here the law used to attach somewhat greater weight to the *name* than to the *description* of the legatee; and, therefore, if there were nothing in the rest of the will, or in the evidence received, to show who was meant, the person rightly named was allowed to take in preference to him who was only rightly described (*o*). This doctrine seems to have been first promulgated by Lord Bacon (*p*), and is embodied by him in the Latin maxim, "Veritas nominis tollit errorem demonstrationis." Thus, where a man had, in the lifetime of his wife, Mary, gone through the marriage ceremony with a reputed second wife, Caroline, with whom he had continued to reside up to the date of his decease, and by a will made shortly before his death devised certain property to "his dear wife Caroline," on the question whether the will designated the lawful wife who was wrongly, or the unlawful wife who was rightly, named, the court held Caroline to be entitled (*q*). The doctrine has, however, been very roughly handled by Lord Chancellor Campbell in the House of Lords (*r*); and if, on the one hand, it cannot at present be safely regarded as exploded (*s*), still less, on the other hand, can it be recognised as an inflexible rule (*t*). The court, in all such cases, will look narrowly at the context and the surrounding facts, and place itself, as nearly as may be, in the situation of the testator at the time of executing the instrument; and if it can then clearly ascertain from the

(*m*) *Doe* v. *Hiscocks*, *supra*; questioning *Hampshire* v. *Peirce*, (1750) 2 Ves. Sen. 216; *Andrews* v. *Andrews*, (1885) 15 L. R. Ir. 199, 211, *supra*, § 1208.

(*n*) See note to § 1202.

(*o*) *Ld. Camoys* v. *Blundell*, (1848) 1 H. L. C. 786, per Parke, B., pronouncing the opinion of the judges. But see *Drake* v. *Drake*, (1860) 29 L. J. Ch. 850; 8 H. L. C. 172; 725 R. R. 94; and *Farrer* v. *St. Catherine's Coll.*, (1873) L. R. 16 Eq. 21; per Ld. Selborne, C., 42 L. J. Ch. 809.

(*p*) *Lord Camoys* v. *Blundell*, *supra*.

(*q*) *Doe* v. *Rouse*, (1848) 5 C. B. 422; 17 L. J. C. P. 108; 75 R. R. 771; *Adams* v. *Jones*, (1852) 9 Hare, 486; 21 L. J. Ch. 352; 89 R. R. 547; *Dilley* v. *Matthews* (1863) 11 W. R. 614; 132 R. R. 853.

(*r*) *Drake* v. *Drake*, (1860) 8 H. L. C. 172, 179.

(*s*) See *In re Plunkett's Estate*, (1861) 11 Ir. Ch. R. 361; *Colclough* v. *Smyth*, (1860) 15 Ir. Ch. R. 347; *Garner* v. *Garner*, (1860) 29 Beav. 116; 131 R. R. 480; *Gillett* v. *Gane*, (1870) 10 Eq. 29; 39 L. J. Ch. 818.

(*t*) *Ld. Camoys* v. *Blundell*, *supra*; *Thomson* v. *Hempenstall*, (1849) 1 Roberts 789.

language of the will thus illustrated (*u*), which of the two claimants was intended by the testator, it will award the legacy to the one so meant to be benefited (*v*), though the supposed maxim may in such case chance to be contravened (*x*).

§ 1216. The case of *Ryall* v. *Hannam* (*y*) affords a striking illustration of this last rule. There, a testator devised an estate to his nephew for life, with remainder over to "*Elizabeth Abbott*, a *natural daughter* of Elizabeth Abbott, of Gillingham, single woman, who had formerly lived in his service." It appeared that, at the date of the will in 1798, Elizabeth Abbott, the mother, was the wife of John Caddy, and had had two children only, both of whom were then living. One was a *natural son* named John, who was born in 1791, before his mother's marriage, and shortly after she had left the testator's service, and of whom the testator's nephew was the putative father; the other, born in 1795, was a *legitimate daughter* by John Caddy, named Margaret. It further appeared that the testator had wished his nephew to marry his servant, that he was aware she had had a natural child, and that he had treated her kindly since its birth and up to the date of the will; but no proof was given that he knew whether the natural child was a boy or a girl. The claimants of the estate were the son of John, the daughter Margaret, and the heir-at-law. Under these circumstances, Lord Langdale, after much doubt, came to the conclusion, that the testator meant to provide for his nephew's natural child by Elizabeth Abbott, his servant, and that the mistake of the name and sex was not sufficient to defeat the devise.

§ 1217. It must, however, be remembered, that in cases of this nature, the court cannot receive any declarations of the testator as to what he intended to do in making his will. This was the precise point

(*u*) *Re Brake*, (1881) 6 P. D. 217; 50 L. J. P. 48.

(*v*) *Garland* v. *Beverley*, (1878) 9 Ch. D. 213; 47 L. J. Ch. 711; *In re Lyon's Trusts*, (1879) 48 L. J. Ch. 245.

(*x*) *Doe* v. *Huthwaite*, (1820) 3 B. & Ald. 632; 22 R. R. 508; explained by Ld. Abinger in *Doe* v. *Hiscocks*, *supra*; *Ld. Camoys* v. *Blundell*, (1848) 1 H. L. C. 778; *Healy* v. *Healy*, (1875) I. R. 9 Eq. 418; *Charter* v. *Charter*, (1874) L. R. 7 H. L. 364; 43 L. J. P. & M. 73; *In re Wolverton Mortgaged Estates*, (1877) 7 Ch. D. 197; 47 L. J. Ch. 217, S. C.; *In re Nunn's Will*, (1875) 44 L. J. Ch. 255; L. R. 19 Eq. 331; *In re Blayney's Trusts*, (1875) I. R. 9 Eq. 413; where the doctrine was certainly carried to its extreme limit by Sullivan, M.R.; *Bernasconi* v. *Atkinson*, (1853) 10 Hare, 345: 90 R. R. 387; *In re Bridget Feltham*, (1855) 1 K. & J. 528; 103 R. R. 221; *Hodgson* v. *Clarke*, (1860) 1 De G. F. & J. 394; 125 R. R. 486; *Re Gregory's Settlt. & Wills* (1865) 34 Beav. 600; 145 R. R. 691; *Re Noble's Trusts*, (1871) I. R. 5 Eq. 140; *Re Kilvert's Trusts*, (1871) L. R. 7 Ch. 170; 41 L. J. Ch. 351; *Dooley* v. *Mahon*, (1877) I. R. 11 Eq. 299; *Re Ray*, (1915) [1916] 1 Ch. 461; 85 L. J. Ch. 781; 114 L. T. 688.

(*y*) (1847) 10 Beav. 536; 16 L. J. Ch. 491; 76 R. R. 201. See, also, *Douglas* v. *Fellows*, (1853) 1 Kay, 114; 23 L. J. Ch. 167; 101 R. R. 527.

determined in the leading case of *Doe* v. *Hiscocks* (*z*). There, a testator devised lands to his son, John Hiscocks, for life; and after his decease, to his grandson, "*John*, the *eldest* son of the said John Hiscocks." In fact, the testator's son had been twice married; by his first wife he had Simon, but John was the eldest son of the second marriage. Under these circumstances the court held that evidence of the instructions given by the testator for his will, and of his declarations, was inadmissible for the purpose of showing which of these two grandsons was intended by the language employed (*a*).

§ 1218. Thirdly, the description, though applicable in no respect to more than one person or thing shown to have been in existence at the time when the instrument in question was executed or made, may *not accurately specify* even one person or thing; that is, the description of the subject intended may be true in part, but not true in every particular. Here, though parol evidence of the author's declarations cannot be received, the instrument will not in consequence of the inaccuracy be regarded as inoperative; but if, after rejecting so much of the description as is false, the remainder will enable the court to ascertain with legal certainty the subject-matter to which the instrument really applies, it will be allowed to take effect (*b*). The rule in such cases is derived from the civil law:—Falsa demonstratio non nocet, cum de corpore constat. Thus, for example, where a testator had left a legacy to his "niece Elizabeth Stringer," and it was proved that at the date of the will no niece of that name was living, a great-great niece of the testator, who, of course, could not be described as his niece with any regard to precision of language, and whose name was not simply Elizabeth, but Elizabeth Jane Stringer, was held entitled to the bequest (*c*).

§ 1219. This case is further remarkable as showing with what strictness the rule is enforced, which excludes parol evidence of a testator's declarations and intentions. The executors who opposed the claim of the great-great niece, did so on what—apart from legal technicalities—would be regarded as very strong grounds; for they were prepared, had the court permitted them, to prove the following facts. The testator had had a niece named Elizabeth Stringer, to

(*z*) (1839) 5 M. & W. 363, 371; 9 L. J. Ex. 27; 52 R. R. 748; where Ld. Abinger questions and overrules the contrary dicta of Ld. Kenyon and Lawrence, J., in *Thomas* v. *Thomas*, (1796) 6 T. R. 677, 678.

(*a*) See, also, *Drake* v. *Drake*, (1860) 8 H. L. C. 172; 29 L. J. Ch. 850; 125 R. R. 94; *Douglas* v. *Fellows*, *supra*; *Bernasconi* v. *Atkinson*, *supra*; *Farrer* v. *St. Catherine's Coll.*, (1873) L. R. 16 Eq. 21; 42 L. J. Ch. 809.

(*b*) See *Ford* v. *Batley*, (1854) 23 L. J. Ch. 225; *Coltman* v. *Gregory*, (1871) 40 L. J. Ch. 352.

(*c*) *Stringer* v. *Gardiner*, (1860) 4 De G. & J. 468; 28 L. J. Ch. 758; 124 R. R 345.

whom by a former will he had left a legacy. This niece, who was grandmother of the claimant, died in 1848; and in 1850, the testator made a codicil which, without alluding to the lapsed legacy, revoked a devise to his grandson. In 1852, he instructed his solicitor to prepare a second codicil with the view of restoring his grandson to favour, and of making some slight alterations in the disposition of his property; but on this occasion also no reference was made to Elizabeth Stringer's legacy. The solicitor recommended that, in lieu of two inconsistent codicils, a new will should be made; and being himself ignorant of the death of the niece, he copied into the second will the bequest in her favour as it stood in the first will. The draft thus framed was duly executed; and as the testator's memory was impaired by age, and his attention moreover was not in any way directed to the legacy in question, no reasonable doubt could be entertained but that, as it had been inserted by the solicitor through ignorance, it was allowed to remain by the testator through forgetfulness. In other words, assuming the evidence to be admissible, the claimant was *clearly* not the object of the testator's bounty. The evidence, however, was rejected, first, by the Master of the Rolls (*d*), and next, by the full Court of Appeal (*e*), and the legacy was consequently awarded to the claimant.

§ 1220. Returning now to the rule, which rejects erroneous descriptions, provided they be not substantially important, it should be borne in mind, as an essential element in the case, that enough must remain to show plainly the intent. "The rule," said Mr. Justice Parke (*f*), "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former." It matters not which part of the description is placed first, and which last, in the sentence; since "it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence" (*g*).

§ 1221 (*h*). Therefore, under a lease of "all that part of Blenheim park, situate in the county of Oxford, and now in the occupation of

(*d*) (1859) 27 Beav. 35.

(*e*) (1860) 4 De G. & J. 468.

(*f*) *Doe* v. *Galloway*, (1833) 5 B. & Ad. 43, 51; 2 L. J. K. B. 182; 39 R. R. 381 See, also, *Doe* v. *Hubbard*, (1850) 15 Q. B. 227; 20 L. J. Q. B. 61; *Doe* v. *Carpenter*, (1851) 16 Q. B. 181; 20 L. J. Q. B. 70.

(*g*) *Stukeley* v. *Butler*, (1615) Hob. 171.

(*h*) Gr. Ev. § 301, in part.

one S., lying " within certain specified abuttals, " with all the houses thereto belonging, and which are now in the occupation of the said S.," a house lying within the abuttals, though not in the occupation of S., was held to pass (*i*). So, by a devise of "all that my farm called Trogue's farm, now in the occupation of C.," the whole farm passed, though it was not all in C.'s occupation (*k*). So, also, a devise of all the testator's freehold houses in Aldersgate Street, when in fact he had only leasehold houses there, has been held in substance and effect to be a devise of his houses in that street, and the word freehold has been rejected as surplusage (*l*). So, if a landlord, having but one house in a street, were to describe it in a lease by a wrong number, and then let a tenant into possession under it, he could not afterwards rely on the error, and contend that no interest had passed; for the number would be rejected as an immaterial part of the description (*m*). And so, where land was described in a patent as lying in the county of M., and further described by reference to natural monuments; and it appeared that the land described by the monuments was in the county of H., and not of M.; that part of the description which related to the county was rejected. The entire description in the patent, said the court, must be taken, and the identity of the land ascertained, by a reasonable construction of the language used. If there be a repugnant description, which, by the other descriptions in the patent, clearly appears to have been made through mistake, that does not make void the patent. But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant is void (*n*). Again, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to the one description, and not to the other, the description of the lands, which he owned, will be taken to be the true one, and the other will be rejected as *falsa demonstratio* (*o*).

(*i*) *Doe* v. *Galloway*, (1833) 5 B. & Ad. 43; 2 L. J. K. B. 182; 39 R. R. 381; *Dyne* v. *Nutley*, (1853) 14 C. B. 122; 98 R. R. 566.

(*k*) *Goodtitle* v. *Southern*, (1813) 1 M. & S. 299; 14 R. R. 435; recognised as law in *Miller* v. *Travers*, (1832) 8 Bing. 253; 1 L. J. Ch. 157; 34 R. R. 703; and in *Slingsby* v. *Grainger*, (1859) 7 H. L. C. 282; 28 L. J. Ch. 616; 115 R. R. 146. See, also, *Hardwick* v. *Hardwick*, (1873) L. R. 16 Eq. 168; 42 L. J. Ch. 636; *Barber* v. *Wood*, (1877) 4 Ch. D. 885; 46 L. J. Ch. 728; *Norreys* v. *Franks*, (1874) I. R. 9 Eq. 18; *Keogh* v. *Keogh*, (1874) I. R. 8 Eq. 449; *Harrison* v. *Hyde*, (1859) 4 H. & N. 805; 29 L. J. Ex. 119; 118 R. R. 777; *Stanley* v. *Stanley*, (1862) 2 J. & H. 491; 134 R. R. 316; *West* v. *Lawday*, (1865) 11 H. L. C. 375; 145 R. R. 238; *White* v. *Birch*, (1867) 36 L. J. Ch. 174; *In re Whatman*, (1865) 34 L. J. P. & M. 17; *Travers* v. *Blundell*, (1877) 6 Ch. D. 436.

(*l*) *Day* v. *Trig*, (1715) 1 P. Wms. 286, cited with approbation by Tindal, C. J., in *Miller* v. *Travers*, *supra*; *Doe* v. *Cranstoun*, (1840) 7 M. & W. 1; 9 L. J. Ex. 294; 56 R. R. 597.

(*m*) *Hutchins* v. *Scott*, (1837) 2 M. & W. 816; 6 L. J. Ex. 186; 46 R. R. 770. See *Hitchin* v. *Groom*, (1848) 5 C. B. 515; 17 L. J. C. P. 145.

(*n*) *Boardman* v. *Reed & Ford's Lessees*, (1832) 6 Pet. 328, 345 (Am.).

(*o*) *Loomis* v. *Jackson*, (1822) 19 Johns. 449; *Lush* v. *Druse*, (1830) 4 Wend. 318; *Jackson* v. *Marsh*, (1826) 6 Cowen, 281; *Worthington* v. *Hylyer*, (1808) 4 Mass. 196;

§ 1222. The rule which rejects erroneous description, and admits parol evidence for the purpose of showing how the mistake arose, was carried to its extreme bounds in the cases of *Selwood* v. *Mildmay* (*p*), and *Lindgren* v. *Lindgren* (*q*). In the former of these cases, a testator had devised to certain legatees £1,250, which he described as "part of his stock in the 4 per cent. annuities of the Bank of England." At the date of the will, and thence up to the time of his death, the testator had no such stock, but he had had some money in the 4 per cents. some years before, and had sold it out, and invested the produce in Long Annuities. Proof of these facts being tendered, the Master of the Rolls admitted the evidence, not, indeed, "to prove that there was a mistake, for that was clear, but to show how it arose;" and he then held, that, as the testator obviously meant to give the legacies, but mistook the fund, the only effect of the mistake as explained by the evidence was, that the legacies ceased to be specific, and must consequently be paid out of the general personal estate. The circumstances in *Lindgren* v. *Lindgren* were nearly identical with those in *Selwood* v. *Mildmay*, and Lord Langdale's judgment proceeded on the same grounds as those on which the former decision was founded. "It is very necessary to observe," said his lordship, "that in the case of *Selwood* v. *Mildmay*, the evidence was received only for the purpose stated by the Master of the Rolls in his judgment," that is, in order to show how the mistake arose, "and not, as it has been erroneously supposed (*r*), for the purpose of showing that the testator, when he used the erroneous description of the 4 per cent. stock, meant to bequeath the Long Annuities, which he had purchased with the produce of the 4 per cent. stock; and that the result of the case was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long Annuities, which the testator had, and did not purport to give, for the 4 per cent. Bank Annuities which he had not, and did purport to give;" but simply to render legacies, which were *primâ facie* specific, payable out of the general personal estate (*s*).

Blague v. *Gold*, (1635) Cro. Car. 447; *Swift* v. *Eyres*, (1636) *id.* 548. The object in cases of this kind is, to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is, to give most effect to those things about which men are least liable to mistake. *Davis* v. *Rainsford*, (1821) 17 Mass. 210; *McIver* v. *Walker*, (1815) 9 Cranch, 178

(*p*) (1797) 3 Ves. 306.

(*q*) (1846) 9 Beav. 358; 15 L. J. Ch. 428; 73 R. R. 385.

(*r*) In *Miller* v. *Travers*, *supra*; and *Doe* v. *Hiscocks*, (1839) 5 M. & W. 370; 9 L. J. Ex. 27; 52 R. R. 748.

(*s*) (1846) 9 Beav. 363. See, also, *Quennell* v. *Turner*, (1851) 13 Beav. 240; 20 L. J. Ch. 237; 88 R. R. 466; *Tann* v. *Tann*, (1863) 2 New R. 412; and *Hunt* v. *Tulk*, (1852) 2 De G. M. & G. 300, in which last case the Lords Justices, in order to set right what appeared to them to be an obvious clerical error, held that the words, "fourth schedule," in a will, should be read as if they were "fifth schedule."

§ 1223. In connection with this subject, notice may be taken of a somewhat arbitrary rule of equitable construction, which prevails in the courts with reference to the interpretation of wills. The rule is, that if legacies be given to any specified number of children, as, for instance, £500 apiece to the *three* children of A., and it turn out that at the date of the will A. had any larger number of children, the court will reject the number mentioned in the will, upon the presumption of mistake, and will award a legacy of £500 to each of A.'s children (*t*). This rule, however, only applies where the testator's intention to benefit the whole class appears by the will (*u*).

§ 1224. Although false statements, which have been introduced into an instrument by way of affirmation only, may be rejected, provided the remaining description be sufficient to identify the person or thing intended, they cannot be disregarded, if they have been used by way of *exception or limitation*; because, in this latter case, it is obvious that they were intended to have a material operation (*v*). Moreover, the reader must not lose sight of another acknowledged rule of construction, that if there be one subject-matter, wherein all the demonstrations in a written instrument are true, and another wherein part are true and part false, the words of such instrument shall be intended words of true limitation to pass only that subject-matter wherein all the circumstances are true (*x*). Such is the correct meaning of the maxim enunciated by Lord Bacon, "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram" (*y*). Thus, where a devise was of "all my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk"; and it appeared that the testator had bought of the Duke four houses very near Snig Hill, and two at some considerable distance from it, and in a place bearing a different name; the court held that the four houses only passed by the devise, though all the six had been purchased by one conveyance, and the testator had redeemed the land

(*t*) *Daniell* v. *Daniell*, (1849) 4 De G. & Sm. 337; 18 L. J. Ch. 157; 84 R. R. 337; *McKechnie* v. *Vaughan*, (1873) L. R. 15 Eq. 289; *Morrison* v. *Martin*, (1846) 5 Hare, 507; 71 R. R. 211; *Lee* v. *Pain*, (1844) 4 Hare, 249, 250; 14 L. J. Ch. 346; 67 R. R. 41; *Scott* v. *Fenoulhett*, (1784) 1 Cox, 79; *Yeats* v. *Yeats*, (1852) 16 Beav. 170; 96 R. R. 80. See *Wrightson* v. *Calvert*, (1860) 1 J. & H. 250; 128 R. R. 350; *Newman* v. *Piercey*, (1876) 4 Ch. D. 41; 46 L. J. Ch. 36.

(*u*) *In re Stephenson*, [1897] 1 Ch. 75; 66 L. J. Ch. 93; and see *In re Mayo*, [1901] 1 Ch. 404; 70 L. J. Ch. 261; where Farwell, J., held that under a bequest "to the three children of A. born prior to her marriage," a fourth *illegitimate* child, of whose existence the testator was ignorant, could not be brought in.

(*v*) *Taylor* v. *Parry*, (1840) 1 Man. & G. 623; 9 L. J. C. P. 298; 56 R. R. 459.

(*x*) *Doe* v. *Bower*, (1832) 3 B. & Ad. 459, 460; 1 L. J. K. B. 156; 37 R. R. 466; *Ex parte Kirk*, *In re Bennett*, (1877) 5 Ch. D. 800; 46 L. J. K. B. 101.

(*y*) *Morrell* v. *Fisher*, (1849) 4 Ex. 604; 19 L. J. Ex. 273; 80 R. R. 709; per Alderson, B. See, also, *Boyle* v. *Mulholland*, (1860) 10 Ir. C. L. R. 150; *Horner* v. *Horner*, (1877) 47 L. J. Ch. 635.

tax upon all by one contract (*z*). So, under a bill of sale assigning "all the household goods of every description at No. 2, Meadow Place, more particularly set forth in an inventory of even date herewith," no goods will pass except those specified in the inventory (*a*).

§ 1225. Where a testator devised to A. his freehold messuage, farms, lands, and hereditaments, in the county of B., and it appeared that he had a farm in that county, consisting of a messuage and 116 acres, the greater part of which was freehold, but a small portion was leasehold for a long term of years at a pepper-corn rent, the court held that as the devise correctly described the freehold, the leasehold part was not included therein, though it was proved that this part was interspersed with, and undistinguishable from, the freehold, and that the whole farm had always been treated as freehold by the testator (*b*). It seems that this last rule will be enforced with greater strictness, where an interpretation is to be put upon a devise of real estate, than in other cases; for it is an established doctrine of construction, that an heir-at-law shall not be disinherited except by express words (*c*).

§ 1226. From the preceding cases and observations the following rules may be collected. First, where in a written instrument the description of the person or thing intended *is applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author (*d*). Secondly, if the description of the person or thing be *partly applicable* and *partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible (*e*). Thirdly, if the description be partly correct and partly

(*z*) *Doe* v. *Bower*, *supra*; *Homer* v. *Homer*, (1878) 47 L. J. Ch. 635, 640; 8 Ch. D. 758, 775; *Pogson* v. *Thomas*, (1840) 6 Bing. N. C. 337; 54 R. R. 812; *Doe* v. *Ashley*, (1847) 10 Q. B. 663; 16 L. J. Q. B. 356; 74 R. R. 472; *Webber* v. *Stanley*, (1864) 16 C. B. (N.S.) 698; 33 L. J. C. P. 217; 139 R. R. 672; *Smith and Goddard* v. *Ridgway*, (1866) 4 H. & C. 577; 143 R. R. 789; *Pedley* v *Dodds*, (1866) L. R. 2 Eq. 819.

(*a*) *Wood* v. *Rowcliffe*, (1851) 6 Ex. 407; 20 L. J. Ex. 285; 86 R. R. 350; *Morrell* v. *Fisher*, *supra*; *Barton* v. *Dawes*, (1850) 10 C. B. 261; 19 L. J. C. P. 302; 84 R. R. 562.

(*b*) *Stone* v. *Greening*, (1843) 13 Sim. 390; 60 R. R. 364; *Hall* v. *Fisher*, (1844) 1 Coll. 47; 66 R. R. 14; *Quennell* v. *Turner*, (1851) 13 Beav. 240; 20 L. J. Ch. 237; 88 R. R. 466; *Evans* v. *Angell*, (1858) 26 Beav. 202; 122 R. R. 78. See, also, *Gilliat* v. *Gilliat*, (1860) 28 Beav. 481; 126 R. R. 224; *Mathews* v. *Mathews*, (1867) L. R. 4 Eq. 278.

(*c*) *Doe* v. *Bower*, *supra*.

(*d*) Wigr. Wills, 160.

(*e*) *Doe* v. *Hiscocks*, (1839) 5 M. & W. 33; 9 L. J. Ex. 27; 52 R. R. 748.

incorrect, and the correct part be sufficient of itself to enable the court to identify the subject intended, while the incorrect part is *inapplicable to any subject*, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by rejecting the erroneous statement (*f*). Fourthly, if the description be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe (*g*). Fifthly, if the language of a written instrument when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to, in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect (*h*).

§ 1227. (*i*) It remains only to notice a class of cases in which parol declarations of intention, in common with other extrinsic evidence, are allowed to affect the operation of a writing, though the writing on its face is free from ambiguity. The class alluded to embraces all those cases in which evidence is offered to rebut an equity (*k*). The meaning of this is, that, where the principles of Equity raise a presumption against the apparent intention of a written instrument, such presumption may be repelled by extrinsic evidence, whether of declarations, or of collateral facts, showing the intention to be otherwise (*l*). The simplest instance of this occurs, when two legacies, left to the same person by different testamentary instruments, are, contrary to the general rule (*m*), presumed not to have been intended as cumulative, on the ground that the sums and the expressed motives of both exactly correspond (*n*). Here, to rebut the presumption, which makes one of these legacies inoperative, parol evidence of every kind will be received; its effect being, not to show that the testator did not mean what he said, but, on the contrary, to prove that he did mean what he has expressed (*o*). In like manner, extrinsic evidence is

(*f*) Wigr. Wills, 67—70.

(*g*) Wigr. Wills, 133.

(*h*) *Doe* v. *Hiscocks*, *supra*; Wigr. Wills, 11, cited *ante*, § 1131, *a*.

(*i*) Gr. Ev. § 296, in part.

(*k*) See *Bulkley* v. *Littlebury*, (1711) 2 Vern. 621; *Francis* v. *Ditchfield*, (1742) 2 Coop. 532.

(*l*) *Hall* v. *Hill*, (1841) 1 Dr. & W. 113; 58 R. R. 223; *Hurst* v. *Beach*, (1810) 5 Madd. 351; 21 R. R. 304; *Trimmer* v. *Bayne*, (1802) 7 Ves. 518; 6 R. R. 173.

(*m*) See *Russell* v. *Dickson*, (1853) 4 H. L. C. 293; 94 R. R. 116; *Brennan* v. *Moran*, (1857) 6 Ir. Ch. R. 126; *Wilson* v. *O'Leary*, (1872) L. R. 7 Ch. 448; 41 L. J. Ch. 342; *Hubbard* v. *Alexander*, (1876) 3 Ch. D. 738; 45 L. J. Ch. 740.

(*n*) *Tatham* v. *Drummond*, (1864) 33 L. J. Ch. 438; *Tuckey* v. *Henderson*, (1863) 33 Beav. 174; 140 R. R. 76.

(*o*) *Hurst* v. *Beach*, *supra*; recognised in *Hall* v. *Hill*, *supra*, and in *Re Tussaud's Estate*, (1878) 9 Ch. D. 363; 47 L. J. Ch. 849.

admissible to repel the presumption against double portions (*p*), which the courts raise, when a father makes a provision for his daughter by settlement on her marriage, and afterwards provides for her by his will (*q*). So, also, to repel the presumption, that the portionment (*r*) of a legatee by a parent or person in *loco parentis* (*s*), was intended to operate as an ademption, *in toto* or *pro tanto* (*t*), of the legacy (*u*).

§ 1228. Again, the courts, — after establishing the somewhat forced presumption, that a debt due from a testator is intended to be satisfied by a legacy of a greater or equal amount bequeathed by him to his creditor (*v*),—have been so little satisfied with the law thus made, that for a long period they have eagerly caught at any trifling circumstance, whether arising out of the language of the will (*x*), or brought under their notice by extrinsic evidence (*y*), in order to afford them an excuse for evading a rule of such questionable policy (*z*). Another illustration is furnished by the doctrine of resulting trusts, where a man purchases property in the name of a stranger. Here,

(*p*) See *Montague* v. *Montague*, (1852) 15 Beav. 565; 92 R. R. 550; *In re Lawes*, (1882) 20 Ch. D. 81. This presumption is not recognised in Scotland: (1858) *Kippen* v. *Darley*, 3 Macq. 203; *Johnstone* v. *Haviland*, [1896] A. C. 95.

(*q*) *Weall* v. *Rice*, (1831) 2 Russ. & Myl. 251, 267; 9 L. J. Ch. 116; 34 R. R. 83; *Ld. Glengall* v. *Barnard*, (1836) 1 Keen. 769, 793; 6 L. J. Ch. 25; *Hall* v. *Hill*, *supra*, per Sugden, C., explaining and limiting the two former cases. See *Lady E. Thynne* v. *Lord Glengall*, (1848) 2 H. L. C. 153-155; 6 L. J. Ch. 25; 81 R. R. 77; *Chichester* v. *Coventry*, (1867) L. R. 2 H. L. 71; 36 L. J. Ch. 673; *Re Tussaud's Estate*, *supra*; *Nevin* v. *Drysdale*, (1867) 4 Eq. 517; 36 L. J. Ch. 662; *Dawson* v. *Dawson*, (1867) L. R. 4 Eq. 504; *Russell* v. *St. Aubyn*, (1876) 2 Ch. D. 398; 46 L. J. Ch. 641; *Bennett* v. *Houldsworth*, (1877) 6 Ch. D. 671; 46 L. J. Ch. 646; *Edgeworth* v. *Johnston*, (1877) Ir. 11 Eq. 326; *Curtis* v. *Mackenzie*, (1877) W. N. 213.

(*r*) This need not be by deed, or in consideration of marriage, *Leighton* v. *Leighton*, (1874) 43 L. J. Ch. 594; 18 Eq. 458.

(*s*) See *Palmer* v. *Newell*, (1855) 8 De Gex, M. & G. 74; 25 L. J. Ch. 461; 114 R. R. 37; *Campbell* v. *Campbell*, (1866) 35 L. J. Ch. 241; L. R. 1 Eq. 383.

(*t*) *Pym* v. *Lockyer*, (1840) 5 Myl. & Cr. 29; 10 L. J. Ch. 153; 48 R. R. 219; recognised in *Suisse* v. *Lowther*, (1843) 2 Hare, 434; 12 L. J. Ch. 315; 62 R. R. 710. See *Montefiore* v. *Guedalla*, (1860) 29 L. J. Ch. 65; 1 De G. F. & J. 93; 125 R. R. 367; *Fowkes* v. *Pascoe*, (1875) L. R. 10 Ch. 343; 44 L. J. Ch. 367; *Ravenscroft* v. *Jones*, (1864) 33 L. J. Ch. 482; 32 Beav. 669; 138 R. R. 906; *Watson* v. *Watson*, (1864) 33 Beav. 574; 140 R. R. 267; *In re Peacock's Estate*, (1872) L. R. 14 Eq. 236.

(*u*) *Trimmer* v. *Bayne*, (1802) 7 Ves. 515; 6 R. R. 173; *Hall* v. *Hill*, (1841) 1 Dr. & W. 120; 58 R. R. 223; *Cooper* v. *Macdonald*, (1873) 42 L. J. Ch. 533, 538; 16 Eq. 258; *Curtin* v. *Evans*, (1872) Ir. 9 Eq. 553; *Kirk* v. *Eddowes*, (1844) 3 Hare, 517; 13 L. J. Ch. 402; 64 R. R. 390; *Hopwood* v. *Hopwood*, (1860) 7 H. L. C. 728; 29 L. J. Ch. 747; 115 R. R. 356; *Schofield* v. *Heap*, (1859) 28 L. J. Ch. 104; *Beckton* v. *Barton*, (1859) 27 Beav. 99; 28 L. J. Ch. 673; 122 R. R. 332; *Phillips* v. *Phillips*, (1864) 34 Beav. 19; 145 R. R. 422. See *ante*, § 1146.

(*v*) *Brown* v. *Dawson*, (1705) Prec. in Ch. 240; *Fowler* v. *Fowler*, (1735) 3 P. Wms. 353; *Atkinson* v. *Littlewood*, (1874) 18 Eq. 595.

(*x*) *Rowe* v. *Rowe*, (1848) 2 De G. & Sm. 297; 17 L. J. Ch. 357; 79 R. R. 214; *Matthews* v. *Matthews*, (1755) 2 Ves. Sen. 636; *Bartlett* v. *Gillard*, (1826) 3 Russ. 156; 6 L. J. Ch. 19; 27 R. R. 45.

(*y*) *Wallace* v. *Pomfret*, (1805) 11 Ves. 547; 8 R. R. 241.

(*z*) See *Edmunds* v. *Low*, (1857) 3 K. & J. 318; 6 L. J. Ch. 342; 112 R. R. 161.

as before observed (*a*), the law raises a presumption in favour of the person who paid the purchase money; but still the stranger may give parol evidence to support his title, and show that the purchase was intended for his benefit, that is, he may rebut the presumption, and support the instrument (*b*).

§ 1229. In all these cases, when parol evidence has been first admitted to show that the presumption drawn by the law is not in accordance with the real intention of the author of the instrument, counter evidence will likewise be received to fortify the presumption; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill founded (*c*). But here it must be carefully noted, that, in the absence of evidence to countervail the presumption, no parol evidence in support of it can be adduced; for, in the first place, such evidence would be unnecessary; and next, its effect, if it had any, would be to contradict the language of the instrument (*d*). If, then, the circumstances on the face of the instrument are such as to rebut the presumption drawn by the law, or if the court does not raise any presumption at all, parol evidence to fortify the presumption in the one case, or to create it in the other, will be alike inadmissible; because, in either event, the effect of the evidence would be to contradict the apparent meaning of the writing (*e*).

§ 1230. The important case of *Hall* v. *Hill* (*f*) affords a good illustration of this distinction. There a father, upon the marriage of his daughter, had given a bond to the husband to secure the payment of £800, part to be paid during his life, and the residue at his decease. He subsequently by his will bequeathed to his daughter a legacy of £800; and the question was, whether this legacy could be considered as a satisfaction of the debt. Parol evidence of the testator's declaration was

(*a*) *Ante*, § 1017.

(*b*) *Hall* v. *Hill*, *supra*. See, also, *Sidmouth* v. *Sidmouth*, (1840) 2 Beav. 447; 9 L. J. Ch. 282; 50 R. R. 235; *Williams* v. *Williams*, (1863) 32 Beav. 370; 138 R. R. 766; *Nicholson* v. *Milligan*, (1868) I. R. 3 Eq. 308.

(*c*) *Kirk* v. *Eddowes*, *supra*; *Hall* v. *Hill*, (1841) 1 Dru. & War. 121; 58 R. R. 223; *Ferris* v. *Goodburn*, (1858) 27 L. J. Ch. 574; 114 R. R. 556.

(*d*) *Id.*

(*e*) *Palmer* v. *Newell*, (1855) 8 De G. M. & G. 74; 25 L. J. Ch. 461; 114 R. R. 37.

(*f*) (1841) 1 Dr. & W. 94; 58 R. R. 223. This case deserves an attentive perusal, the judgment of Sugden, C., containing an elaborate discussion of all the important authorities on the subject. The cases of *Wallace* v. *Pomfret*, (1805) 11 Ves. 542; 8 R. R. 241; *Coote* v. *Boyd*, (1789) 2 Bro. C. C. 521; *Weall* v. *Rice*, (1831) 2 Russ. & Myl. 251, 263; 9 L. J. Ch. 116; 34 R. R. 83; *Booker* v. *Allen*, (1831) 2 Russ. & Myl. 270; 9 L. J. Ch. 130; 34 R. R. 91; and *Lloyd* v. *Harvey*, (1832) *id.* 310, are much shaken, if not overruled, by this decision.

tendered to show that such was his real intention, and Lord Chancellor Sugden acknowledged that the evidence, if admissible, was conclusive on the subject (*g*). His Lordship, however, finally decided, that though the debt was to be regarded in the light of a portion (*gg*), yet as it was due to the daughter's husband, while the legacy was left to the daughter herself, the ordinary presumption against double portions was rebutted by the language of the instruments, or, rather, it could not, under the circumstances, be raised by the court; and the consequence was, that the declarations were rejected. Indeed, the evidence would have been equally inadmissible in the first instance, on the ground of its inutility, had the ordinary presumption arisen; though, in such case, had the opponent offered parol evidence to show that the testator intended that the debt should not be satisfied by the legacy, the evidence rejected might then have been received with overwhelming effect, to corroborate and establish the presumption of law.

§ 1231. With the view of clearly understanding the subject under discussion, it is essential to distinguish between mere *legal presumptions* and *rules of construction;* because, while the former may be rebutted and if rebutted, supported also, by parol testimony, no evidence can be received on either side, if the court by construction can arrive at a conclusion respecting the meaning of the instrument (*h*). Yet, important as it is to mark this distinction, it is by no means easy on all occasions to do so; and the difficulty is increased by the loose manner in which the word "presumption" has occasionally been used. Thus, instead of confining it to its strict sense, as meaning an inference raised by the courts independently of, or against, the words of an instrument, it is often employed as denoting an inference in favour of a given construction of particular language (*i*). For instance, in *Coote* v. *Boyd* (*k*), Lord Thurlow says:—"Where the presumption arises from the construction of words, simply *quâ* words, no evidence can be admitted," —evidently using the word presumption as tantamount to a rule of law. Among the rules of construction (*l*) which have occasionally been mistaken for legal presumptions, may be mentioned the one now clearly established, which awards to a stranger legatee as many legacies as are bequeathed to him by separate instruments, unless the instruments themselves contain *intrinsic* evidence that the legacies were not intended to be cumulative, or unless the double coincidence of the same amounts

(*g*) 1 Dr. & W. 112.

(*gg*) *Id.* 108, 109.

(*h*) *Lee* v. *Pain*, (1845) 4 Hare, 216; 14 L. J. Ch. 346; 67 R. R. 41; *Hall* v. *Hill*, *supra*; *Barrs* v. *Fewkes*, (1865) 34 L. J. Ch. 522.

(*i*) *Lee* v. *Pain*, (1845) *supra.*

(*k*) (1789) 2 Br. C. C. 527.

(*l*) For other rules of construction relating to wills, see 7 W. 4 & 1 V., c. 26, ss. 24—33; *Re George's Estate, King* v. *George*, (1877) 46 L. J. Ch. 670; *Everett* v. *Everett*, (1877) 7 Ch. D. 428; 47 L. J. Ch. 367; *In re Ord*, (1878) 9 Ch. D. 667.

and the same expressed motives appearing in each instrument induces the court to presume that repetition, and not accumulation, was intended (*m*). Extrinsic evidence cannot be received to impugn this rule; for to admit it would be to construe a writing by parol evidence (*n*).

(*m*) *Hurst* v. *Beach*, (1821) 5 Madd. 358; 21 R. R. 304; *Suisse* v. *Lowther*, (1843) 2 Hare, 424, 432, 433; 12 L. J. Ch. 315; 62 R. R. 170; *Lee* v. *Pain*, *supra*; *Kirk* v. *Eddowes*, (1844) 3 Hare, 516; 13 L. J. Ch. 402; 64 R. R. 390; *Roch* v. *Callen*, (1847) 6 Hare, 531; 17 L. J. Ch. 144; 77 R. R. 224.

(*n*) *Id.*

PART III.

INSTRUMENTS OF EVIDENCE.

CHAPTER I.

WITNESSES, AND THE MEANS OF PROCURING THEIR ATTENDANCE.

§ 1232. In the *Third Part* of this work, it is intended to treat of the Instruments of evidence, or, in other words, of the means by which facts are proved. In dealing with this subject an attempt will be made to show how such instruments are obtained, in what manner they are used, to what extent, and under what circumstances, they are admissible, and what is their effect.

§ 1233 (*a*). Now, Evidence is of two classes, *unwritten* and *written*. By *unwritten*, or *oral evidence*, is meant the testimony given by witnesses, *vivâ voce*, either in open court, or before a magistrate or other officer, acting by virtue of a commission or other legal authority. Under this head it is proposed briefly to consider, first, the methods, in general, of procuring the attendance and testimony of witnesses; secondly, the competency of witnesses; and, thirdly, the practice which obtains in the examination of witnesses, and herein, of the impeachment and corroboration of their testimony.

§ 1234. The attendance of witnesses, whether for the prosecution or the defence, before justices of the peace is enforced by summons (*b*), or if necessary by Crown Office subpœna.

§ 1234A. Witnesses who have given evidence before justices of the peace are, if the accused be committed for trial (or in certain exceptional cases if notice of appeal is given), usually bound over by recognizance to attend and give evidence at the trial or hearing of the

(*a*) Gr. Ev. §§ 307, 308, in great part.
(*b*) See 11 & 12 V. c. 43; 42 & 43 V. c. 49, s. 36.

appeal. A *recognizance* is a bond of record, testifying that the recognizor owes the King a certain sum, to be levied on his goods and tenements for the use of His Majesty, if he fail to appear to prosecute or give evidence at the time and place specified in the condition (*c*). By the Indictable Offences Act, 1848 (*d*), the justice before whom the preliminary investigation is heard, is authorised in all cases, whether of felony or misdemeanor, to bind by recognizance all such persons as know the facts or circumstances of the case, to appear and give evidence before the grand jury and at the trial against the party accused; and the Coroners Act, 1887 (*e*), gives similar power to all coroners taking an inquisition, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact.

§ 1235. These provisions, which respectively apply to justices and coroners, not only of counties, but of all other jurisdictions (*f*), are obviously of great use in promoting the due administration of justice: but, in order to avoid any hardship which, in the event of non-attendance, witnesses might incur from having their recognizances indiscriminately estreated, it is enacted, that the officer of the court, by whom the estreats are made out, shall prepare a written list of defaulters, specifying the name, residence, and trade or profession of each, the nature of the offence respecting which he was to testify, the cause, if known, of his absence, and the fact whether by reason of his non-attendance the ends of justice have been defeated or delayed. This list must then be laid before the judge at the assizes, or before the recorder or other corporate officer, or the chairman or two other justices of the peace at the sessions, who are respectively required to examine it, and to make such order touching the estreating of the recognizances as they shall consider just; but no recognizance can be estreated or put in process, without the written order of the presiding judge or other persons, before whom the list has been laid (*g*). If the witness, after having been examined on oath before the magistrate or coroner, shall refuse to be bound over, he may be committed (*h*); and where a married woman, who could not enter

(*c*) See form No. 36 in Appendix to Rules under the Summary Jurisdiction Act, 1879.

(*d*) 11 & 12 V. c. 42, s. 20. The correspond. Irish Act, 14 & 15 V. c. 93, enacts in s. 13, cl. 6, that "whenever in cases of indictable offences the justice or justices shall see fit, they may bind the witnesses by recognizance to appear at the trial of the offender and give evidence against him," and if such witnesses refuse to be bound, they may be committed. The form of the recognizance is given in the Sch.

(*e*) 50 & 51 V. c. 71, s. 5; 9 G. 4, c. 54, s. 4.

(*f*) 11 & 12 V. c. 42, ss. 1, 16, 20; the latter section being amended by 42 & 43 V. c. 49; 7 G. 4, c. 64, s. 6; 14 & 15 V. c. 93, s. 44.

(*g*) 7 G. 4, c. 64, s. 31; 9 G. 4, c. 54, s. 34.

(*h*) 11 & 12 V. c. 42, s. 20; 2 Hale, P. C. 282; *Bennet* v. *Watson*, (1814) 3 M. & S. 1; 9 G. 4, c. 54, s. 2, Ir. See *Ashton's Case*, (1845) 7 Q. B. 169.

into her own recognizances, refused either to appear at the sessions or to find sureties for her appearance, the court held that the justice was fully warranted in committing her, in order that she might be forthcoming as a witness at the trial (*i*). It seems that a recognisance to prosecute or give evidence is binding on an infant; at least, it has been held that infancy is no ground for discharging a forfeited recognisance to appear at the assizes to prosecute for felony (*k*); but the better opinion is, that a justice is not authorised to commit any witness for refusing to find sureties to be bound with him, provided he be willing to enter into his own recognizance (*l*).

§ 1236. This mode of enforcing attendance on criminal trials is not confined to witnesses for the Crown, but extends equally to those whom the accused wishes to call on his behalf. By an Act passed in 1867, it is rendered necessary that the committing justice should ask the accused "whether he desires to call any witnesses," and if he answers in the affirmative, the witnesses are sworn, and examined, and their depositions are reduced to writing (*m*). The statute then goes on to enact, that "such witnesses,—not being witnesses merely to the character of the accused,—as shall in the opinion of the justice give evidence in any way material to the case, or tending to prove the innocence of the accused shall be bound by recognisance to appear and give evidence at the trial" (*n*).

§ 1239 (*o*). A *second mode* of procuring the attendance of witnesses, which may be adopted in criminal cases is by means of a Crown Office subpœna. A "subpœna" is the ordinary mode of summons to attend as a witness at trials of any civil case, being served upon the witness. This is a judicial writ, which the proper officer, on production to him of a præcipe in due form for filing (*p*), is bound to issue at the instance of the party applying for it, without any order of the court for that purpose having first been obtained (*q*). It must, in the High Court, be in one or other of seven Forms given in the Rules (*r*); and it is directed to the witness, commanding him in the King's name to attend at the court, and to give evidence in a cause pending therein, which is described in the writ. If the witness be required to pro-

(*i*) *Bennet* v. *Watson*, (1814) 3 M. & S. 1.

(*k*) *Ex parte Williams*, (1824) 13 Price, 670; M'Clel. 493; 20 R. R. 231, S. C.

(*l*) Per Graham, B., as cited 2 Burn, Just. 122; per Ld. Denman in *Evans* v *Rees*, (1839) 12 A. & E. 59; 9 L. J. M. C. 83; 54 R. R. 533.

(*m*) 30 & 31 V. c. 35, ss. 3 & 4, cited *ante*, § 490, n.

(*n*) *Id.* § 3.

(*o*) Gr. Ev., § 309, in part.

(*p*) R. S. C., Ord. XXXVII., R. 26, and Form 21 in App. G.

(*q*) *Holden* v. *Holden*, and *Hill* v. *Dolt*, (1857) 7 De G. M. & G. 397; 109 R. R 185.

(*r*) See Ord. XXXVII., R. 27, and Forms 1, 7, in App. J.

duce any documents, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum*. When the attendance of a witness is required to be given before a court possessing criminal jurisdiction, it is (as in civil cases) commanded by subpœna, but such subpœna is issued out of the Crown Office Department of the King's Bench Division, and is hence briefly called a "Crown Office subpœna." A Crown Office subpœna may either simply require the attendance of the witness, or be a *subpœna duces tecum*. When a Crown Office subpœna is required to secure the attendance of a witness at petty sessions, quarter sessions, or assizes, it cannot be obtained from the Clerk of the Peace, or from the Clerk of Assize. Its issue must be obtained from the Crown Office in London. This is usually done by the London agents of the solicitor employed by the party by whom the attendance of the witness, before either of the tribunals just mentioned, is required. A few days ought usually to be allowed for procuring the writ, but, in urgent cases, it may be obtained by return of post, or even in answer to a telegram to agents in London, in a much less time. The application at the Crown Office for a Crown Office subpœna is made by a solicitor, or by a solicitor's clerk, but it is sometimes made by the party in person. An applicant for a Crown Office subpœna fills up a proper form of subpœna on parchment with the name of at least one witness, pays for and affixes to it a stamp for five shillings, upon which it is sealed for him. Subpœnas are not allowed to be issued in blank except to the police and to the solicitors to the Treasury. But in general a Crown Office subpœna will not be sealed for parties in person till after particular enquiry by the Crown Office into the matter, and on their being satisfied that such subpœna is not sought for some malicious purpose or for annoyance (*s*). A Crown Office subpœna can be served anywhere in England.

§ 1240. A *subpœna duces tecum* must specify with reasonable distinctness the particular documents required; and a general direction to produce all papers relating to the subject in dispute will not be enforced (*t*). When a witness is served with a *subpœna duces tecum*, he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the judge, who will decide upon the validity

(*s*) The King's Bench Division has jurisdiction to set aside a subpœna issued in a criminal proceeding. A witness served with a subpœna cannot get it set aside by merely swearing that he can give no material evidence. Where a subpœna is set aside, the power of the judge at the trial to order the witnesses to attend, if he thinks their presence necessary, is in no way interfered with: *R.* v. *Baines*, [1909] 1 K. B. 258; 78 L. J. K. B. 119.

(*t*) *Lee* v. *Angas*, (1866) 35 L. J. Ch. 370; 1 Eq. 59; *Att.-Gen.* v. *Wilson*, (1839) 9 Sim. 526; 8 L. J. Ch. 119; 47 R. R. 305.

of any excuse that may be offered for withholding them (*u*). An attachment, therefore, will lie against an overseer or solicitor of a parish, who, in an inquiry touching the settlement of a pauper, refuses to bring the rate-books of such parish to the petty sessions, in obedience to a Crown Office subpœna; though it may be very questionable whether he would be bound to submit these books to examination, in the event of his bringing them into court (*v*). So, the fact that the legal custody of the instrument belongs to another person will not authorise a witness to disobey the subpœna, provided the instrument be in his actual possession (*x*); but documents filed in a public office are not so in the possession of the clerk, as to render it necessary, or even allowable, for him to bring them into court without the permission of the head of the office (*y*). Neither will the secretary of a company be exposed to an attachment for declining to produce at a trial documents, which have been entrusted to him simply as a servant of the company, and which the directors have specially forbidden him to produce (*z*).

§ 1241. A writ of subpœna, though commanding the witness to attend "from day to day until the cause be tried," suffices for only one sitting of the court, or for one assize; and, therefore, if the cause be made a remanet, or be adjourned to another session, or assize, the writ must be resealed, and the witness summoned anew (*a*). Again, if any alteration be made in the writ, after it is sued out, though before it is served, it must be resealed (*b*); and, therefore, when the day of appearance named in a subpœna was altered by an

(*u*) *Amey* v. *Long*, (1808) 9 East, 473; 9 R. R. 589. See, *ante*, § 23; and as to what is a valid excuse, see *ante*, §§ 458—460.

(*v*) *R.* v. *Greenaway*, and *R.* v. *Carey*, (1845) 7 Q. B. 126.

(*x*) *Amey* v. *Long*, *supra*.

(*y*) *Thornhill* v. *Thornhill*, (1820) 2 J. & W. 347; *Austin* v. *Evans*, (1841) 2 Man. & G. 430.

(*z*) *Crowther* v. *Appleby*, (1873) L. R. 9 C. P. 23; 43 L. J. C. P. 7. It does not clearly appear from the report of *Eccles* v. *Louisville and Nashville Railroad Co.*, [1912] 1 K. B. 135; 81 L. J. K. B. 445, whether an order made under the Foreign Tribunals Evidence Act, 1856 (19 & 20 V. c. 113), for production of documents by a witness ordered under that Act to attend to be examined before an examiner stands on quite the same footing as an ordinary *subpœna duces tecum*. The manner in which the majority of the Court of Appeal (Vaughan Williams and Buckley, L.JJ.) dealt with the case would seem to leave open this question. The judgments of these Lords Justices do not deal specifically with *Crowther* v. *Appleby*. On the other hand, Kennedy, L.J., appears to have regarded that case as being in point. It is thought that *Eccles' Case* cannot be disregarded in relation to *subpœnas duces tecum*, and treating it as applicable, it goes further than *Crowther* v. *Appleby*, and shows that even in the absence of express prohibition by his master a servant will not be attached for non-production of documents who suggests as his reason for non-compliance that production would be a breach of his duty to his master, unless the Court is satisfied that such reason is in fact ill founded [qu. :] and not put forward *bonâ fide* by the servant.

(*a*) *Sydenham* v. *Rand*, (1784) 3 Doug. 429.

(*b*) See Ord. XXXVII., R. 31.

attorney from one term to another, it was held that the writ thereby became void, and that the witness, on whom it was served subsequently to the alteration, might treat it as waste paper (*c*).

§ 1241A. An ordinary writ of subpœna differs in this respect from a *subpœna duces tecum*, that while the former "contains three names when necessary or required, and may contain any larger number of names" (*d*), the latter cannot include more than three persons, and the party suing it out may, if it be deemed desirable, have a separate writ for each person (*e*).

§ 1242 (*f*). The service of a subpœna upon a witness is of no validity if not made within twelve weeks after the *teste* of the writ (*g*). It must also in all cases be made a reasonable time before trial, to enable the witness to put his affairs in such order, that his attendance on the court may be as little detrimental as possible to his interests (*h*). A writ of subpœna may, as a general rule, be served at any stage of proceedings in an action, yet, service at a time, when to the knowledge of the parties the action cannot possibly be tried during the current sittings amounts to an abuse of the process of the court and ought to be set aside (*i*). A summons in the morning to attend in the afternoon of the same day, has more than once been held insufficient, though the witness lived in the same town, and very near to the place of trial (*k*). Where, however, a witness was served at noon, while standing on the steps of the court-house, and being then told that the cause was coming on that day, replied, "very well," the court held that his non-attendance at five o'clock, when the trial was heard, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time (*l*). So, if a witness attend a trial in obedience to a subpœna, he cannot refuse to be examined on the ground of any irregularity in the service (*m*). So, if a witness be in court as a spectator, he cannot, it seems, object to give evidence, on the ground that the subpœna has only just been served upon him (*n*); though, if he be a solicitor, who is engaged in winding up another cause, the rule may be different; or, at least, it

(*c*) *Barber* v. *Wood*, (1838) 2 M. & Rob. 172, per Ld. Abinger.
(*d*) Ord. XXXVII., R. 29.
(*e*) R. 30.
(*f*) Gr. Ev. § 314, in part.
(*g*) R. 34.
(*h*) *Hammond* v. *Stewart*, (1735) 1 Str. 510.
(*i*) *London and Globe Finance Corporation* v *Kaufman*, (1900) L. J. Ch. 196.
(*k*) *Hammond* v. *Stewart*, *supra*; *Barber* v. *Wood*, (1838) 2 M. & Rob. 172.
(*l*) *Maunsell* v. *Ainsworth*, (1840) 8 Dowl. 869; *Jackson* v. *Seagar*, (1844) 2 Dowl. & L. 13; 13 L. J. Q. B. 217.
(*m*) *Wisden* v. *Wisden*, (1849) 6 Beav. 549.
(*n*) *Doe* v. *Andrews*, (1778) 2 Cowp. 845.

is highly probable that he would not be liable to an attachment for disobedience (*o*). Neither in criminal prosecutions can a witness decline to be sworn, though he has not been subpœnaed at all (*p*). But, in civil cases a witness may always refuse to be examined, unless he be properly served with a writ, "proper service" being only effected when accompanied by the payment of proper "conduct money" (*q*). But an objection to give evidence which is founded on this ground must be made before the witness is sworn, and will not be entertained afterwards, and it may moreover be waived by the witness by conduct (*r*).

§ 1243. Where a subpœna, requiring the attendance of a witness on the 31st of March, and so on from day to day until the action should be tried, was served on the 2nd of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April when the cause was heard (*s*); though, had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would at least have avoided the penalty of an attachment (*t*). The question whether the writ has been served within a reasonable time is in the discretion of the judge (*u*), and varies according to the circumstances of each case (*v*).

§ 1244. Under the R. S. C., 1883, "the *service* of a subpœna shall be effected by delivering a copy of the writ, and of the indorsement thereon, and at the same time producing the original writ" (*x*). But it would seem that personal service may be dispensed with, if the witness keeps out of the way to avoid such service (*y*). The provision which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot

(*o*) *Pitcher* v. *King*, (1845) 2 Dowl. & L. 755; 14 L. J. Q. B. 99.

(*p*) *R.* v. *Sadler*, (1830) 4 C. & P. 218.

(*q*) *Bowles* v. *Johnson*, (1748) 1 W. Bl. 36. See contrà, *Blackburn* v. *Hargreave*, (1828) 2 Lew. C. C. 259, where Hullock, B., is reported to have held, that, if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. *Sed qu.* A witness is not bound to obey a subpœna in a civil cause, unless his expenses be tendered, although the party, who requires his testimony, is suing in *formâ pauperis*. 2 Lewin C. C. 259, per Hullock, B.

(*r*) See *post*, § 1249.

(*s*) *Davis* v. *Lovell*, (1839) 7 Dowl. 178; 8 L. J. Ex. 152.

(*t*) *Id.* 183; *Alexander* v. *Dixon*, (1823) 1 Bing. 366; 2 L. J. (O.S.) C. P. 22.

(*u*) *Barber* v. *Wood*, (1838) 2 M. & Rob. 172; *ante*, § 23.

(*v*) See, further, the analogous cases, respecting the reasonable service of a notice to produce, *ante*, § 445.

(*x*) Ord. XXXVII., R. 32.

(*y*) Jelf, J. in chambers, on 7th Feb., 1908, ordered substituted service in *Dyson* v. *Forster*; and see *Hamilton* v. *Thomas*, (1883) W. N. 31.

be chargeable with a contempt in not appearing upon the summons (*z*). Again, "the affidavits filed for the purpose of proving the service of a subpœna upon any *defendant*, must state when, where, and how, and by whom, such service was effected" (*a*).

§ 1245. If the copy of the writ vary in any material degree from the original subpœna, as where the copy required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained (*b*). So, the writ must state, with reasonable certainty, the name of the cause, as also the place in which the attendance of the witness is required (*c*). Where, however, the subpœna required the attendance of the witness at Westminster Hall, the Nisi Prius sittings being in fact held at the adjoining sessions-house, it was ruled that an attachment might be granted for non-attendance at the sessions-house, notices having been affixed to the wall of the Court in Westminster Hall, directing witnesses to proceed to that place (*d*). So, where a subpœna, tested the 9th of May and served on the 19th, required attendance on the 21st of March *instant*, the court considered that this was an error which could not mislead (*e*).

§ 1246. A witness served with a subpœna is, in civil cases, entitled to be paid or tendered his expenses. The question as to what constitutes the reasonable costs and charges of a witness was left, in former times, very much to the discretion of the taxing officers; but that question is now set at rest by the formal adoption of scales of remuneration.

§ 1246A. In the various divisions of the High Court there now are regular scales of allowances to witnesses (*f*). The allowances to witnesses in bankruptcy proceedings are, in the High Court, the same as in other proceedings in the High Court: in the County Court such allowances are in accordance with the scale for the time being in force in County Courts (*g*). Such witnesses have a statutory right to the pay-

(*z*) *Wadsworth* v. *Marshall*, (1832) 1 Cr. & M. 87; 2 L. J. Ex. 10; *R.* v. *Wood*, (1832) 1 Dowl. 509; *Garden* v. *Cresswell*, (1837) 2 M. & W. 319; 6 L. J. Ex. 84; 46 R. R. 610; *Jacob* v. *Hungate*, (1835) 3 Dowl. 456; *Pitcher* v. *King*, (1845) 2 Dowl. & L. 755; 14 L. J. Q. B. 99.

(*a*) Order XXXVII., R. 33.

(*b*) *Doe* v. *Thomson*, (1841) 9 Dowl. 948.

(*c*) *Id.*; *Swanne* v. *Taaffe*, (1845) 8 Ir. Law R., 101; *Milson* v. *Day*, (1829) 3 M. & P. 333.

(*d*) *Chapman* v. *Davis*, (1841) 1 Dowl. N. S. 239; 11 L. J. C. P. 51.

(*e*) *Page* v. *Carew*, (1831) 1 Cr. & J. 514; 9 L. J. Ex. 192.

(*f*) For these the reader is referred to the various practice books. In consequence, however, of the provisions of Order LXV., r. 27 (9), the scale is no longer binding in either the K. B. D. (*Turnbull* v. *Janson*, (1878) 3 C. P. D. 264; 47 L. J. C. P. 374), or the Ch. D. (*East Stonehouse Local Board* v. *Victoria Brewery Co.*, [1895] 2 Ch. 514; 64 L. J. Ch. 793), and in practice a somewhat more liberal scale of allowance is usually adopted.

(*g*) Bankruptcy Rule 72.

ment of expenses similar to the above (*h*). In the Court for the trial of either Parliamentary or Municipal Election Petitions, the scale of remuneration is identical with that adopted in the High Court (*i*). Costs in criminal cases are dealt with by the Costs in Criminal Cases Act, 1908 (*k*).

§ 1247. The taxing masters will be justified (*l*), under special circumstances, in allowing costs for the attendance of witnesses who have not been subpœnaed, or for the detention of witnesses beyond the actual period of the trial, or for services rendered by skilled witnesses, who either prior to the trial have been employed under the direction of the court (*m*), or at the trial have been retained to watch the testimony of other witnesses (*n*). Moreover, in the High Court a rule—rejecting the old practice of the Common Law Courts (*o*), and adopting that of the Court of Chancery (*p*)—provides that, "as to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed" (*q*). By virtue of this rule the master may, in the exercise of his discretion, allow to *scientific* witnesses for their attendance larger sums than can be awarded to ordinary witnesses under the general scale of allowances (*r*). The term "*procuring evidence*" has been held to include all preliminary costs incurred in *qualifying* witnesses to give evidence at the trial (*s*). Again, if a foreign witness, who is not accessible by subpœna, but whose evidence is material in the cause, refuses to leave his home unless he be remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party (*t*); and where the captain of a ship has been detained for a long time in this country in order to give

(*h*) *Chamberlain* v. *Stoneham*, (1889) 61 L. T. 560; 59 L. J. Q. B. 95. See *Rendell* v. *Grundy*, [1895] 1 Q. B. 16; 64 L. J. Q. B. 135, for the position of a judgment debtor ordered to attend and be examined as to his means.

(*i*) 31 & 32 V. c. 125, s. 34; 45 & 46 V. c. 50, s. 94, sub-s. 9. See *McLaren* v. *Home*, (1881) 7 Q. B. D. 477; 50 L. J. Q. B. 658.

(*k*) 8 Ed. 7, c. 15. See s. 5.

(*l*) See *D. of Beaufort* v. *Ld. Ashburnham*, (1863) 32 L. J. C. P. 97; 13 C. B. (N.S.) 598; 134 R. R. 671. See *Churton* v. *Frewen*, (1867) 46 L. J. Ch. 660.

(*m*) *Robb* v. *Connor*, (1874) I. R. 9 Eq. 373.

(*n*) *Ryan* v. *Dolan*, (1872) I. R. 7 Eq. 92.

(*o*) See *Nolan* v. *Copeman*, (1873) L. R. 8 Q. B. 84; 42 L. J. Q. B. 44; *May* v. *Selby*, (1842) 4 Man. & G. 142; 11 L. J. C. P. 223; *Murphy* v. *Nolan*, (1873) I. R. 7 Eq. 498, 500.

(*p*) *Batley* v. *Kynock*, (1875) L. R. 20 Eq. 632; 44 L. J. Ch. 565; *Smith* v. *Buller*, (1875) 19 Eq. 473.

(*q*) Ord. LXV., R. 27 (9).

(*r*) *Turnbull* v. *Janson*, (1878) 3 C. P. D. 264; 47 L. J. C. P. 384.

(*s*) *Mackley* v. *Chillingworth*, (1877) 46 L. J. C. P. 484; 2 C. P. D. 273; *Turnbull* v. *Janson*, *supra*. In Ireland the expenses of experts cannot be allowed at a rate exceeding the scale relating thereto: *Maconchy* v. *Bank of New Zealand*, [1900] 1 Ir. R. 22.

(*t*) *Lonergan* v. *Royal Exchange Assurance*, (1831) 7 Bing. 725; *Tremain* v. *Barrett*, (1815) 6 Taunt. 88; 16 R. R. 584.

evidence on a trial, large sums, calculated at a guinea a day, and amounting in the whole to above £100, have been allowed for his detention (*u*). So, the court, under very special circumstances, has allowed, in taxation of costs, subsistence money to a seafaring man, who was a necessary witness in his own cause, and who, after having obtained a verdict, remained in England until a rule for a new trial, granted at the instance of his opponent, had been discharged (*v*). Where no special circumstances intervene, the expenses of the attendance of witnesses on the commission day of the assizes will not be allowed as against the losing party on taxation of costs (*x*).

§ 1249. The reasonable expenses of a witness ought to be tendered to him at the time when he is served with the subpœna (*y*), or, at least, a reasonable time before the trial (*z*); and even though he actually appears, he cannot be attached for declining to give evidence, unless these charges are paid or tendered (*a*), if he refuses to give evidence on that ground before being sworn. These expenses now include a reasonable remuneration for loss of time (*b*). He has, however, no right to refuse to be examined on the ground that the expenses incurred by him on former attendances have not been paid (*c*). If the witness be a married woman, the money should, it seems, be tendered to her, rather than to her husband (*d*); and if a person be subpœnaed by both parties, he is entitled, before giving evidence, to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side (*e*). Of course the witness may waive his right to demand the payment of his expenses, and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled (*f*),

(*u*) *Stewart* v. *Steele*, (1842) 4 Man. & G. 669; 11 L. J. C. P. 155; *Mount* v. *Larkins*, (1832) 8 Bing. 195; 1 L. J. C. P. 89; 34 R. R. 644; *Temperley* v. *Scott*, (1832) 8 Bing. 392; 1 L. J. C. P. 46; *Potter* v. *Rankin*, (1870) L. R. 5 C. P. 518; 39 L. J. Q. B. 147; *Evans* v. *Watson*, (1846) 3 C. B. 327; 15 L. J. C. P. 256; *Berry* v. *Pratt*, (1823) 1 B. & C. 276; 1 L. J. (O.S.) K. B. 116; 25 R. R. 396. See *The Bahia*, (1865) L. R. 1 A. & E. 15; *The Karla*, (1864) Br. & Lush., 367.

(*v*) *Dowdell* v. *Austral. Roy. Mail Co.*, (1854) 3 E. & B. 902; 23 L. J. Q. B. 369; 97 R. R. 821. See *Howes* v. *Barber*, (1852) 18 Q. B. 588; 21 L. J. Q. B. 254; *Calvert* v. *Scinde Ry.*, (1865) 18 C. B. (N.S.) 306; 144 R. R. 501.

(*x*) *Harvey* v. *Divers*, (1855) 16 C. B. 497; 100 R. R. 810.

(*y*) *Fuller* v. *Prentice*, (1788) 1 H. Bl. 49; 2 R. R. 715; *In the goods of Harvey*, (1907) 23 Times R. 433.

(*z*) *Horne* v. *Smith*, (1815) 6 Taunt. 9.

(*a*) *Bowles* v. *Johnson*, (1748) 1 W. Bl. 36; *Newton* v. *Harland*, (1840) 1 Man. & G. 956; 10 L. J. C. P. 11; 56 R. R. 488; *Brocas* v. *Lloyd*, (1857) 23 Beav. 129; 26 L. J. Ch. 758; 113 R. R. 69. *Ante*, § 1242.

(*b*) *In re Working Men's Mutual Soc.*, (1882) 21 Ch. D. 831; 51 L. J. Ch. 50; *Chamberlain* v. *Stoneham*, (1889) 24 Q. B. D. 113; 59 L. J. Q. B. 95.

(*c*) *Gaunt* v. *Johnson*, (1848) 6 Beav. 551.

(*d*) *Goodwin* v. *West*, (1637) as reported Cro. Car. 522.

(*e*) *Allen* v. *Yoxall*, (1844) 1 Car. & K. 315; *Betteley* v. *M'Leod*, (1837) 3 Bing. N. C. 405, 407; 6 L. J. C. P. 111.

(*f*) *Betteley* v. *M'Leod*, (1837) 3 Bing. N. C. 405.

or indirectly, by accompanying the parties to the place of trial without previously making any claim (*g*), he will be liable to all the consequences of disobedience, should be subsequently refuse to appear as a witness (*h*).

§ 1250. The law is not very clear as to what circumstances will justify a witness, who, in obedience to a subpœna, has attended a trial in a civil cause, in bringing an action for his expenses and loss of time. It was formerly considered that expenses only could be recovered, and these only if an express contract had been made upon the subject (*i*); or if a promise to pay from the fact of the attendance of the witness at the trial could be inferred, and that where such an inference was drawn, the action could be supported by the implied contract (*k*). Remuneration for loss of time was considered not to be recoverable on the ground that a witness was bound to attend upon the subpœna and that there was therefore no consideration for any promise to pay remuneration (*l*). The effect, however, of the Common Law Procedure Act, 1852, and the directions of the judges thereunder as to the scale of allowances to witnesses, and of the present Rules of the Supreme Court, is to recognise the right of witnesses, in certain cases, to remuneration for loss of time; and in several cases (*m*) professional men have been held entitled to recover by action the remuneration provided for by the scale. It is submitted, therefore, that under the present law a witness subpœnaed in a civil cause may recover from the person on whose behalf he has been subpœnaed, not only his bare expenses, but such remuneration as is provided for by the scale. No action lies by the witness against the solicitor who subpœnaed him, unless the solicitor has made himself personally liable by express contract (*n*). An expert witness called to depose to a matter of opinion is, and has always been (*o*), entitled to payment for his services; and the amount of his remuneration depends upon the special contract between himself and the person on whose behalf he is called.

(*g*) *Newton* v. *Harland*, (1840) 1 Man. & G. 956; 10 L. J. P. C. 11; 56 R. R. 488. In that case, the witness having accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, though she was held to be still entitled to claim her fair expenses for returning home.

(*h*) *Goodwin* v. *West*, (1637) Cro. Car. 522, 540.

(*i*) *Hallet* v. *Mears*, (1810) 13 East, 15; 12 R. R. 296; *Goodwin* v. *West*, *supra*.

(*k*) *Pell* v. *Daubeny*, (1850) 5 Ex. 955; 20 L. J. Ex. 44; 82 R. R. 942.

(*l*) *Willis* v. *Peckham*, (1820) 1 Br. & B. 515; 21 R. R. 706; *Collins* v. *Godefroy*, (1831) 1 B. & Ad. 950; 9 L. J. (O.S.) K. B. 158; 35 R. R. 496.

(*m*) *Hale* v. *Bates*, (1858) E. B. & E. 575; 28 L. J. Q. B. 14; 113 R. R. 792; *Chamberlain* v. *Stoneham*, *supra*; and see *In re Working Men's Mutual Society*, *supra*.

(*n*) *Robins* v. *Bridge*, (1837) 3 M. & W. 114; 7 L. J. Ex. 49; 49 R. R. 531; *Lee* v. *Everest*, (1857) 2 H. & N. 285, 292; 26 L. J. Ex. 334; 115 R. R. 536.

(*o*) *Webb* v. *Page*, (1843) 1 Car. & K. 23; 70 R. R. 767.

§ 1251. It here deserves notice, that conduct-money received by a witness with a subpœna may be recovered back by the party who paid it, as money had and received, where the attendance of the witness has become unnecessary, and no expenses have been incurred under the writ (*p*).

§ 1252 (*q*). In *criminal cases*, no tender of fees is in general necessary, either on the part of the Crown or of the prisoner, in order to compel the attendance of the respective witnesses (*r*); and this rule will prevail, though the indictment has been removed by certiorari, and is, consequently, tried in the Nisi Prius Court (*s*). An exception, however, has been recognised by the Legislature in favour of those witnesses, who, living in one distinct part of the United Kingdom, are required to obey subpœnas directing their attendance in another; and who are not liable to punishment for disobedience of the process, unless, at the time of service, a reasonable and sufficient sum of money, to defray their expenses in coming, attending, and returning, has been tendered to them (*t*). Another exception would seem to be recognised in courts-martial, when any person who is not subject to military law is summoned as a witness; for although the Army Act, 1881, contains no positive enactment enforcing the payment of fees to such a witness, he cannot be punished for making default in his attendance, unless he has been paid or tendered his reasonable expenses (*u*).

§ 1253. The Costs in Criminal Cases Act, 1908 (*v*), enacts:—

6.—(1) The court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining justices, as taxed by the proper officer of the court.

(2) Where a person is acquitted on any indictment or information by a private prosecutor for the publication of a defamatory libel, or for any offence against the Corrupt Practices Prevention Act, 1854 (*x*), or for the offence of any corrupt practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883 (*y*), or on

(*p*) *Martin* v. *Andrews*, (1856) 7 E. & B. 1; 26 L. J. Q. B. 39; 110 R. R. 472.
(*q*) Gr. Ev. § 311, as to first three lines.
(*r*) *Pell* v. *Daubeny*, *supra*; *R.* v. *Cooke*, (1824) 1 C. & P. 322.
(*s*) *R.* v. *Cooke*, *supra*. See *post*, § 1256.
(*t*) 45 G. 3, c. 92, s. 4. See also 44 & 45 V. c. 24, s. 4, sub-s. 3; and 44 & 45 V. c. 69, ss. 15 and 27.
(*u*) 44 & 45 V. c. 58, s. 126, sub-s. 1*a*.
(*v*) 8 Ed. 7, c. 15
(*x*) 17 & 18 V. c. 102.
(*y*) 46 & 47 V. c. 51.

an indictment for an offence under the Merchandise Marks Acts, 1887 to 1894, or on an indictment presented to a grand jury under the Vexatious Indictments Act, 1859 (*z*), in a case where the person acquitted has not been committed to or detained in custody, or bound by recognizance to answer the indictment, the court before which the person acquitted is tried may order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, including any proceedings before the examining justices, as taxed by the proper officer of the court.

(3) Where a charge made against any person for any indictable offence (not dealt with summarily) is dismissed by the examining justices, the justices may, if they are of opinion that the charge was not made in good faith, order the prosecutor to pay the whole or any part of the costs incurred in or about the defence, but if the amount ordered to be paid exceeds twenty-five pounds, the prosecutor may appeal against the order to a Court of Quarter Sessions in manner provided by the Summary Jurisdiction Acts, and no proceedings shall be taken upon the order until either the time within which the appeal can be made has elapsed without an appeal being made, or, in case an appeal is made, until the appeal is determined or ceases to be prosecuted.

7. Where a person has been committed for trial for an indictable offence and is not ultimately tried, the court to which he is committed shall have power to direct or order payment of costs under this Act in the same manner as if the defendant had been tried and acquitted.

9.—(1) In this Act the expression "indictable offence" includes any offence punishable on summary conviction when that offence is under the Summary Jurisdiction Acts deemed to be as respects the person charged an indictable offence, and the expression "prosecutor" includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on.

(2) Any reference in this Act to a person committed for trial shall include a reference to a person whom a prosecutor is bound over to prosecute under the Vexatious Indictments Act, 1859, and any reference to the court to which a person is committed shall in such a case be construed as a reference to the court at which the prosecutor is so bound over to prosecute.

(3) This Act shall not apply in the case of an offence in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, and costs in any such case may be allowed as in civil proceedings as if the prosecutor or defendant were plaintiff or defendant in any such proceedings.

(*z*) 22 & 23 V. c. 17.

(4) This Act shall apply in a case of a person committed as an incorrigible rogue under the Vagrancy Act, 1824 (*a*), as if that person were committed for trial for an indictable offence, and in the case of any appeal under that Act as if the hearing of the appeal by the court of quarter sessions were the trial of an indictable offence.

§ 1256. The Acts, previous to the Costs in Criminal Cases Act, 1908, which authorised the awarding of costs to prosecutors and witnesses for the Crown in criminal trials, did not apply to cases where the indictment had been removed into the King's Bench Division of the High Court by certiorari (*b*); and no distinction was recognised in this respect between a removal by the prosecutor and a removal by the defendant (*c*). Under the former Acts, the expenses of attendance of witnesses before the coroner could not be reimbursed (*d*).

§ 1257. In August, 1851, the Secretary of State for the Home Department was authorised to make regulations with respect to the amount of costs to be allowed to prosecutors and their witnesses in criminal cases (*e*); and the Costs in Criminal Cases Act, 1908 (*f*), provides that such regulations shall continue to have effect as if they had been made under the powers given by that Act (*g*).

§ 1258. In some grave cases of felony (*h*), as, for instance, where persons are charged, either as principals, or as accessories before the fact, with any of the following crimes:—viz.: murder (*i*); attempting

(*a*) 5 G. 4, c. 83

(*b*) *R.* v. *Kelsey*, (1832) 1 Dowl. 481; *R.* v. *Richards*, (1828) 8 B. & C. 420; 6 L. J. (O.S.) M. C. 102; *R.* v *Johnson*, (1827) 1 Moo. C. C. 173; *R.* v. *Jeyes*, (1835) 3 A. & E. 419. See *ante*, § 1252.

(*c*) *R.* v. *Treasurer of Exeter*, (1829) 5 M. & R. 167; 8 L. J. (O.S.) K. B. 89; 8 L. J. M. C. 120; and see 8 A. & E. 590.

(*d*) *R.* v. *Lewen*, (1832) 2 Lewin C. C. 161; *R.* v. *Rees*, (1832) 5 C. & P. 302; *R.* v. *Taylor*, (1832) *id.* 301. These cases would seem to be applicable to the Act of 1908 also.

(*e*) 14 & 15 V. c. 55, ss. 4, 5, 6.

(*f*) 8 Ed. 7, c. 15, s. 10 (1) *a*.

(*g*) See 8 Ed. 7, c. 15, s. 5 for the power of the Secretary of State to make regulations.

(*h*) 14 & 15 V. c. 55, s. 7, provides that "nothing in this Act or in any regulations under this Act, shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion, in, or towards any such apprehension as hereinbefore mentioned, of such sum as such court shall think reasonable, and adjudge to be paid, in respect of such extraordinary courage, diligence, or exertion."

(*i*) 7 G. 4, c. 64, s. 28, enacts, that, "where any person shall appear to any court of Oyer and Terminer, Gaol Delivery, superior criminal court of a county palatine, or Court of Great Sessions, to have been active in or towards the apprehension of any person charged with *murder or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at, any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the mis-*

to murder (*k*); stabbing, cutting, or poisoning (*l*); shooting at any one, or attempting to discharge loaded fire-arms at him (*m*); administering anything to a woman to procure her miscarriage (*n*); rape (*o*); housebreaking (*p*); robbery (*q*); arson (*r*); horse-stealing (*s*), bullock-stealing (*t*), or sheep-stealing (*u*); and receiving stolen property knowing it to have been stolen (*v*);—the courts, whether of oyer and terminer and gaol delivery, or of sessions of the peace (*x*), are empowered

carriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to *any court of sessions of the peace* to have been active in or towards the apprehension of any party, charged with *receiving stolen property* knowing the same to have been stolen, such court shall have the power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are, by this Act, empowered to allow to prosecutors and witnesses respectively." Section 29 provides that the sheriff shall pay the amount awarded, and shall be repaid by her Majesty's treasury; and section 30 enacts, that if any man shall be killed in endeavouring to apprehend any person charged with any of the offences mentioned in § 28, the court may order the sheriff to pay to his widow, child, father, or mother, such sum as in its discretion shall seem meet.

(*k*) This offence, though not mentioned in the statute, has been held to be within the spirit of the enactment, and extra expenses incurred in apprehending a prisoner, who was charged with attempting to murder by suffocation, have been allowed, *R.* v *Durkin*, (1837) 2 Lew. C. C. 163.

(*l*) 7 G. 4, 64, s. 28, cited in last note but one.

(*m*) *Id.*

(*n*) *Id.*

(*o*) *Id.*

(*p*) *Id.* This term, it seems, does not include the crime of sacrilege, *R.* v. *Robinson*, (1828) 1 Lewin C. C. 129.

(*q*) *Id.*

(*r*) *Id.*

(*s*) *Id.*

(*t*) *Id.* This word describes a *class* of offences, and includes the crime of stealing cows, heifers, &c., *R.* v. *Gillbrass*, (1836) 7 C. & P. 444.

(*u*) *Id.*

(*v*) *Id.* See also, 5 G. 4, c. 84, s. 22, which provides, that whoever shall discover and prosecute to conviction any offender, being unduly at large within the kingdom before the expiration of his sentence of transportation or banishment "shall be entitled to a reward of £20 for every such offender so convicted"; and, though no provision is made in the Act for the mode of recovering the reward, the judges have held that the presiding judge at the trial has power to make an order for its payment on the county treasurer, *R.* v. *Emmons*, (1840) 2 M. & Rob. 279; *R.* v. *Ambury*, (1852) 6 Cox, C. C. 79. See the Irish Acts of 6 & 7 W. 4, c. 116, ss 106, 107; and 7 & 8 V. c. 106, s. 42.

(*x*) 14 & 15 V. c. 55, s. 8, enacts, that, "when any person appears to any Court of Sessions of the peace to have been active in or towards the apprehension of any

to order that any persons who have been especially active in apprehending the offenders, shall be paid some additional remuneration for their expenses (*y*), exertions (*z*), and loss of time.

§ 1259. The Costs in Criminal Cases Act, 1908 (*a*), enables the courts mentioned in the Act to direct the payment of the costs of the prosecution or defence or both in accordance with the provisions of the Act out of the funds of the county or county borough.

§ 1260. In all criminal cases, the prisoner is entitled to have compulsory process for obtaining witnesses in his favour (*b*). Independently of enactments, the court may, for the purposes of defence, direct constables to restore to prisoners any property which may have been taken from them, provided only that it be not required as an instrument of proof at the trial, and that it do not fairly appear to be the produce of the crime with which they stand charged (*c*).

§ 1260A. The Costs in Criminal Cases Act, 1908 (*d*), provides that "where it has been certified that a prisoner ought to have legal aid under the Poor Prisoners' Defence Act, 1903 (*e*), the costs which may be directed to be paid under this section shall, subject to the regulations of the Secretary of State under this Act, include the fees of solicitor and counsel, the costs of a copy of the depositions, and any other expenses properly incurred in carrying on the defence."

§ 1261. As writs of subpœna have no force beyond the jurisdic-

party charged with any of the offences in the said enactment mentioned" (that is, in section 28 of 7 G. 4, c. 64), "which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned; provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation, be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

(*y*) The judge has no power, as it seems, to order the payment of expenses incurred in apprehending a prisoner out of England, *R.* v. *Barrett*, (1852) 6 Cox, C. C. 78. The Secretary of State must, in such case, be memorialised; *id.*

(*z*) Under this word, a gratuity may be awarded to a prosecutor for his courage in apprehending the prisoner, *R.* v. *Womersly*, (1836) 2 Lewin C. C. 162; though he has not been put to any expense, *R.* v. *Barnes*, (1835) 7 C. & P. 166. If the facts do not appear in evidence, the judge will require them to be laid before him on affidavit, *R.* v. *Jones*, (1834) *id.* 167.

(*a*) 8 Ed. 7, c. 15, s. 1.

(*b*) 2 Hawk. P. C. c. 46, ss. 170, 172; 2 Ph. Ev. 378; Russ. C. & M.; Const. U. S. Amendm. Art. 6. See 30 & 31 V. c. 35, ss. 3 & 4, extending the operation of 11 & 12 V. c. 42, ss. 16, 20; 4 & 5 G. 5, c. 58, s. 29.

(*c*) *R.* v. *Barnett*, (1829) 3 C. & P. 600; *R.* v. *Jones*, (1834) 6 *id.* 343; *R.* v. *O'Donnell*, (1835) 7 *id.* 138; *R.* v. *Kinsey*, (1836) *id.* 447; *R.* v. *Burgiss*, (1836) *id.* 488; *R.* v. *Rooney*, (1836) *id.* 515; *R.* v. *Frost*, (1839) 9 *id.* 131.

(*d*) 8 Ed. 7, c. 15, s. 1 (3).

(*e*) 3 Ed. 7, c. 38.

tional limits of the court from which they issue, it is obvious that, in order to secure the due administration of justice, additional powers were required to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part. In 1805, an Act (*f*) was passed supplying a partial remedy for the evil, that is, a remedy which only extended to criminal prosecutions. This statute provides in substance, that the service of a subpœna or other process upon any person in one part of the United Kingdom, requiring his appearance to give evidence in any *criminal prosecution* in another part, shall be as effectual as if the process had been served in that part where the witness is required to appear. If the person served does not appear, the court out of which the process issued may, upon proof of service, transmit a certificate of the default, under the seal of the court, or under the hand of one of the judges, to the King's Bench Division of the High Court in England or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of these parts of the kingdom; and such courts respectively, on proof that a reasonable sum was tendered to the witness for his expenses, may punish him for his default, in like manner as if he had refused to appear in obedience to process issuing out of these respective courts.

§ 1262. The Attendance of Witnesses Act, 1854 (*g*), enacts as follows:—"I. If in any action or suit now or at any time hereafter depending in any of her Majesty's Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or if such court is not sitting, to any judge of any of the said courts respectively, that it is proper (*h*) to compel the personal attendance at any trial (*i*) of any witness, who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ called a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, or warrant of citation, shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom, and the service of any such writ or

(*f*) 45 G. 3, c. 92, ss. 3, 4.

(*g*) 17 & 18 V. c. 34.

(*h*) The affidavit on which the application is founded, must disclose facts to show that the attendance of the witness is reasonably necessary, *Allen* v. *Duke of Hamilton*, (1867) L. R. 2 C. P. 630.

(*i*) This term will not include the hearing of an action, which "with all matters in difference" has been referred to an arbitrator; *Hall* v. *Brand*, (1883) 12 Q. B. D. 39; 53 L. J. Q. B. 19; *supra*. *Quære*, will it include the hearing of a claim in chambers, *Power* v. *Webber*, (1876) I. R. 10 Eq. 188; or a reference before a master; *O'Flanagan* v. *Geoghegan*, (1864) 16 C. B. (N.S.) 636; 139 R. R. 643? See *Hall* v. *Brand*, *supra*, and see *post*, § 1309.

process in any part of the United Kingdom shall be as valid and effectual to all intents and purposes as if the same had been served within the jurisdiction of the court from which it issues. II. Every such writ shall have at the foot thereof a statement or notice that the same is issued by the special order of the court or judge, as the case may be; and no such writ shall issue without such special order. III. In case any person so served shall not appear according to the exigency of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof, and of such default, to the satisfaction of the said court, to transmit a certificate of such default, under the seal of the same court, or under the hand of one of the judges or justices of the same, to any of her Majesty's Superior Courts of Common Law at Westminster, in case such service was had in England, or in case such service was had in Scotland, to the Court of Session or Exchequer at Edinburgh, or in case such service was had in Ireland, to any of her Majesty's Superior Courts of Common Law at Dublin; and the court to which such certificate is so sent, shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna or other process issued out of such last-mentioned court. IV. None of the said courts shall in any case proceed against or punish any person, for having made default by not appearing to give evidence in obedience to any writ of subpœna or other process issued under the powers given by this Act, unless it shall be made to appear to such court, that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or process was served upon such person. V. Nothing herein contained shall alter or affect the power of any of such courts to issue a commission for the examination of witnesses out of their jurisdiction, in any case in which, notwithstanding this Act, they shall think fit to issue such commission. VI. Nothing herein contained shall alter or affect the admissibility of any evidence at any trial, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the court, but the admissibilty of all such evidence shall be determined as if this Act had not passed." By the Judicature Act, 1884 (*k*), a judge may now exercise the powers thus given, whether a court be sitting or not.

§ 1264. Inferior Courts of Record, though authorised to issue subpœnas, can only in general (*l*) do so within their own jurisdiction.

(*k*) 47 & 48 V. c. 61, s. 16; 40 & 41 V. c. 57, s. 21.
(*l*) See *post*, § 1291, as to the Cy. Cts.

Subpœnas, therefore, which are granted by the clerk of assize or clerk of the peace are not compulsory except within a single county or other more limited district; and the consequence is, that if a necessary but unwilling witness happens to live, as he often does, beyond these limits, application must be made to the Central Office of the Supreme Court, for the issue of a Crown Office subpœna.

§ 1265 (*m*). If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of court, and may be proceeded against by *attachment*. In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he would not have been forthcoming when required to give evidence. The jury need not be sworn; and it is no longer necessary even that the witness should be called upon his subpœna before withdrawing the record. This last form is, indeed, usually followed, and the practice is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. Still, it is not essential; and in some cases, as if the witness had left England two days before the trial, it would be merely an idle ceremony (*n*).

§ 1266 (*o*). As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the court (*p*), the case must be perfectly clear to justify the exercise of this extraordinary jurisdiction (*q*). The motion for an attachment should therefore be brought forward as soon as possible (*r*), and the party applying must show by affidavit that a copy of the subpœna was personally and in due time served on the witness (*s*), that when such service was effected, the original writ was shown to him (*t*), that his fees, if he were entitled to them,

(*m*) Gr. Ev. § 319, in some part.

(*n*) *Lamont* v. *Crook*, (1840) 6 M. & W. 615; 9 L. J. Ex. 253; 55 R. R. 741; *Barrow* v. *Humphreys*, (1820) 3 B. & A. 598; *Dixon* v. *Lee*, (1834) 1 Cr. M. & R. 645; 40 R. R. 667; *Mullett* v. *Hunt*, (1833) 1 Cr. & M. 752; 2 L. J. Ex. 287; 38 R. R. 750; *Goff* v. *Mills*, (1844) 2 Dowl. & L. 23; 13 L. J. Q. B. 227. These cases overrule *Malcolm* v. *Ray*, (1819) 3 Moore, 222, and *Bland* v. *Swafford*, (1791) Pea. 60; and resolve the doubt expressed in *R.* v. *Stretch*, (1835) 4 Dowl. 30. See *Cast* v. *Poyser*, (1856) 3 Sm. & G. 369; 107 R. R. 119.

(*o*) Gr. Ev. § 319, in part.

(*p*) *Barrow* v. *Humphreys*, *supra*.

(*q*) *Horne* v. *Smith*, (1815) 6 Taunt. 10, 11; *Garden* v. *Cresswell*, (1837) 2 M. & W. 319; 6 L. J. Ex. 84; 46 R. R. 610; *Scholes* v. *Hilton*, (1842) 10 M. & W. 15; 11 L. J. Ex. 332; *R.* v. *Lord J. Russell*, (1839) 7 Dowl. 793.

(*r*) *R.* v. *Stretch*, (1835) 4 Dowl. 30.

(*s*) *Ante*, §§ 1242—1244.

(*t*) *Garden* v. *Cresswell*, *supra*; *Jacob* v. *Hungate*, (1834) 3 Dowl. 456; *R.* v. *Sloman*, (1832) 1 Dowl. 618; 36 R. R. 827; *Smith* v. *Truscott*, (1843) 1 Dowl. & L. 530; 12 L. J. C. P. 336; *Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, (1851) 11 C. B. 398; 87 R. R. 702.

were paid or tendered (*u*), or the tender waived (*v*), and, in short, that everything has been done which was necessary to secure his attendance (*x*). It must also appear from the affidavits, that the absence of the witness was an intentional defiance of the process of the court (*y*); but if this be clearly shown, the witness, as it seems, cannot justify his conduct by proving that his evidence was immaterial (*z*).

§ 1267. The fact, however, of immateriality is sometimes important, as tending to negative the existence of wilful misconduct. Thus, the court refused to grant an attachment against Lord Brougham, when it was evident, from the notes of the judge who tried the cause, that his presence at the trial would not have served the complainant (*a*); and they observed, that they would not allow the process of the court to be used for purposes of needless vexation. So, in the case of Lord John Russell and Mr. Fox Maule, who had disobeyed writs of *subpœna duces tecum*, the court, in discharging a rule for an attachment, relied on the fact that the documents, if produced, would not have been admissible (*b*). In *R.* v. *Sloman* (*c*), the rule for an attachment was refused, the witness having had reasonable ground for believing that he would not be wanted at the trial. On the other hand, it must be remembered, that the duty of attending a court of justice in pursuance of a subpœna is paramount to the duty of obedience to the commands of any master, however stringent and express those commands may be (*d*); and, on this ground, an attachment has issued against a solicitor, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence. The court held, that he had no right to speculate on the chance of being in time (*e*). Of course, if the witness be too ill to

(*u*) *Ante*, § 1246; *Connor* v. ——, (1842) Ir. Cir. R. 610, per Pennefather, B.; *Brocas* v. *Lloyd*, (1856) 23 Beav. 129; 26 L. J. Ch. 758; 113 R. R. 69.

(*v*) *Goff* v. *Mills*, *supra*. See *ante*, § 1249.

(*x*) 2 Ph. Ev. 377; *Garden* v. *Cresswell*, *supra*. See *Hempston* v. *Humphreys*, (1867) I. R. 1 C. L. 271.

(*y*) *Scholes* v. *Hilton*, *supra*; *Netherwood* v. *Wilkinson*, (1855) 17 C. B. 226; 104 R. R. 666.

(*z*) *Chapman* v. *Davis*, (1841) 3 Man. & G. 609, 611, 612; 11 L. J. C. P. 51; *Scholes* v. *Hilton*, *supra*. These cases appear to overrule *Tinley* v. *Porter*, (1837) 5 Dowl. 744; 6 L. J. Ex. 233; 46 R. R. 778; and *Taylor* v. *Williams*, (1830) 4 Moo. & P. 59.

(*a*) *Dicos* v. *Lawson*, (1835) 1 Cr. M. & R. 934; 4 L. J. Ex. 80.

(*b*) (1839) 7 Dowl. 693.

(*c*) (1832) 1 Dowl. 618.

(*d*) *Goff* v. *Mills*, (1844) 2 Dowl. & L. 23, 28; 13 L. J. Q. B. 227, per Wightman, J.

(*e*) *Jackson* v. *Seager*, (1844) 2 Dowl. & L. 13; 13 L. J. Q. B. 217.

attend (*f*), or if leave of absence has been given him by the solicitor of the party requiring his attendance (*g*), no attachment will lie; and, on ordinary principles of justice, it would seem that if in a criminal case, where no fees were tendered, a witness from real poverty should be unable to obey the summons, he would not be guilty of contempt (*h*).

§ 1268. Although the High Court will grant an attachment against a witness for disobeying a Central Office (*i*) subpœna to give evidence in an inferior court (*k*), provided that distinct proof be given by affidavit that the inferior court had jurisdiction to examine the witness (*l*), it has no power, either at common law, or by virtue of the Act of 45 G. 3, c. 92 (*m*), to interfere, unless the writ has issued from the Central Office (*n*). In all those cases where the process is granted by the clerk of assize, or clerk of the peace, and the witness disobeys the summons, the court whose process is disobeyed may itself proceed against him, either by fine or imprisonment, for the contempt (*o*), or, in the case of an inferior court, the contemnor may be proceeded against by indictment.

§ 1269. Though a flagrant case of palpable contempt be shown, such as an express and positive refusal to attend, the court will not grant an attachment in the first instance; but the uniform practice which now prevails is to obtain the leave of the court or a judge, "to be applied for on notice to the party against whom the attachment is to be issued" (*p*).

(*f*) *In re Jacobs*, (1835) 1 Har. & W. 123. See *Scholes* v. *Hilton*, (1842) 10 M. & W. 15; 11 L. J. Ex. 332.

(*g*) *Farrah* v. *Keat*, (1838) 6 Dowl. 470.

(*h*) 2 Ph. Ev. 383.

(*i*) The Crown Office is now a department of the Central Office, 42 & 43 V. c. 78, s. 5. R. S. C., Ord. LXI., R. 1.

(*k*) *R.* v. *Ring*, (1800) 8 T. R. 585; 5 R. R. 478; *R.* v. *Greenaway*, (1845) 7 Q. B. 126.

(*l*) *R.* v. *Vickery*, (1848) 12 Q. B. 478; 16 L. J. M. C. 69.

(*m*) As to which Act, see *ante*, § 1261.

(*n*) *R.* v. *Brownell*, (1834) 1 A. & E. 598; 3 L. J. M. C. 118; 140 R. R. 374.

(*o*) As to fining the contemnor in his absence, see *R.* v. *Clement*, (1821) 4 B. & Ald. 218; 23 R. R. 260. Notwithstanding the doubt expressed upon the subject by the author (edition 1835, p. 1082) it is thought that no distinction ever existed between the power of fine and imprisonment possessed by Courts of Quarter Session in cases within their jurisdiction and Courts of Oyer and Terminer and Gaol Delivery, which were formerly accounted inferior courts. Since the Judicature Act the latter are now incorporated with the High Court of Justice and consequently are no longer inferior courts.

(*p*) R. S. C., Ord. XLIV., R. 2. Service of notice on the party's solicitor, or at his place of residence, is sufficient, without personal service on the party himself, *Browning* v. *Sabin*, (1877) 5 Ch. D. 511; 46 L. J. Ch. 728; *In re a Solicitor*, (1880) 14 Ch. D. 152. See, however, *Re Bassett*, [1894] 3 Ch. 179; 63 L. J. Ch. 844. A judge at chambers may order the writ to issue: *Salm Kyrburg* v. *Posnanski*, (1884) 12 Q. B. D. 218; 53 L. J. Q. B. 428.

§ 1270. Besides the mode of proceeding by attachment, the party injured in a civil suit by the non-attendance of a witness has his remedy by an action for damages at common law (*q*). To support this action it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna (*qq*); neither is it requisite that the statement of claim should contain a direct and positive averment that the party had a good cause of action or a good defence, but it will suffice to state and prove, that the witness was material, that the trial could not safely proceed without him, and that, in point of fact, the party has sustained some damage by the absence of the witness (*r*). Accordingly, plaintiff cannot practically proceed against a witness for having disobeyed his subpœna, unless he has had a good case in the original action; because, in order to recover damages from the witness, he must show that he has sustained some loss through his default, and this he can scarcely do without having had himself good grounds in the former suit (*s*). This reason, however, does not apply, where several issues have been joined in the original action; for, in such a case, it may well happen that the plaintiff, though he had no complete cause of action or defence, may have sustained damage in respect of the costs of some of the issues, on which, although failing generally in his suit, he might have succeeded by the testimony of the witness, had he duly attended the trial (*t*). In this last class of cases, therefore, the traverse of an averment of a good cause of action would simply raise an immaterial issue (*u*). It seems that the same strictness of proof with respect to the form and service of the writ, which is necessary to render the witness guilty of contempt, will not be requisite in order to sustain the action (*v*); and it has been held, that, although for the purpose of bringing the witness into contempt the original writ must be shown at the time when the copy is served, this course is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded by the witness (*x*).

(*q*) Formerly a special action of debt to recover a £10 penalty with compensation in addition was maintainable under 5 Eliz., c. 9, s. 6. But this statute was repealed by 1 G. 5, c. 6.

(*qq*) *Lamont* v. *Crook*, (1840) 6 M. & W. 625; 9 L. J. Ex. 253; 55 R. R. 741. See *ante*, § 1265.

(*r*) *Mullett* v. *Hunt*, (1833) 1 Cr. & M. 752; 2 L. J. Ex. 287; 38 R. R. 750; *Davis* v. *Lovell*, (1839) 4 M. & W. 678; 8 L. J. Ex. 152; *Couling* v. *Coxe*, (1848) 6 C. B. 703; 18 L. J. C. P. 100; 77 R. R. 446. See *Yeatman* v. *Dempsey*, (1861) 127 R. R. 914; 9 C. B. (N.S.) 881; *Needham* v. *Fraser*, (1845) 1 C. B. 815; 14 L. J. C. P. 256; *Crewe* v. *Field*, (1896) 12 Times L. R. 405.

(*s*) *Couling* v. *Coxe*, *supra*.

(*t*) *Id.* 703, 719, 720.

(*u*) *Id.*

(*v*) *Davis* v. *Lovell*, *supra*.

(*x*) *Mullett* v. *Hunt*, *supra*.

§ 1272. When the *witness is in custody*, the writ of subpœna is of no avail, and the party requiring his evidence must either apply for a *habeas corpus ad testificandum* (*y*), or obtain a warrant or order under the hand of one of the judges of the High Court (*z*). The granting of the writ of *habeas corpus* is in several cases regulated by statute. Thus, the Act of 43 G. 3, c. 140, provides, that any judge of the [High Court] may, at his discretion, award a writ of *habeas corpus* for bringing any prisoner, detained in a gaol or prison in England, before any court-martial, any commissioners for auditing public accounts, or other commissioners acting by virtue of any royal commission or warrant, for trial, or to be examined touching any matter depending before such court-martial or commissioners; and the statute 44 G. 3, c. 102, enacts, that a judge of the Supreme Court in England or in Ireland may, at his discretion, grant a *habeas corpus* to bring up *any prisoner*, detained in a gaol or prison, before *any court of record*, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal, depending, or to be inquired into or determined, in any such court. Again, the Acts of 1 W. 4, c. 22, and 3 & 4 V. c. 105, which respectively relate to England and Ireland, and were passed to enable witnesses to be examined by commissioners in certain cases, before the trial of the cause in which their testimony would be required, enact—the first, in section 6, the second in section 71—that "it shall be lawful for any sheriff, gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of that Act, by virtue of a writ of *habeas corpus* to be issued for that purpose, which writ shall and may be issued by any court or judge under such circumstances, and in such manner, as such court or judge may now by law issue the writ commonly called a writ of *habeas corpus ad testificandum*."

§ 1273. The application for a writ under either of the two first-mentioned statutes, if not under the last two, must be made to a judge at chambers (*a*), on an affidavit, stating the place and cause of confinement of the witness, and, further, that his evidence is material, and that the party cannot, in his absence, safely proceed to trial (*b*); and if the prisoner be confined at a great distance from the place of trial, the judge will perhaps require that the affidavit should point out in what manner his testimony is material (*c*). If the witness is to give evidence in a civil suit, it is usual to add in the affidavit that he is

(*y*) See R. S. C., App. J., Form 2.

(*z*) See § 1276, *post*.

(*a*) *Gordon's Case*, (1814) 2 M. & S. 582; *Browne* v. *Gisborne*, (1843) 2 Dowl. N. S. 263; 12 L. J. Q. B. 297.

(*b*) See the form, Chit. Forms.

(*c*) *Standard* v. *Baker*, (1786) cited Tidd, 858.

willing to attend; but this would seem to be a needless averment, and it is certainly not required in criminal proceedings (*d*). When a party to the record is in custody, he is entitled to the writ for himself as much as for any other witness, provided that his evidence be necessary at the trial (*e*).

§ 1274. Before the passing of the statute 44 G. 3, c. 102, it was held that neither a prisoner in custody for high treason (*f*), nor a prisoner of war (*g*), could be brought up by a *habeas corpus ad testificandum*. It may now be fairly questioned whether the words of the Act, "*any* prisoner detained in *any* prison," would not be sufficiently large to warrant the interference of the judge in both these cases; and though considerations of state policy might, perhaps, lead the judges to narrow the interpretation of the statute in the case of prisoners of war, no valid reason can be urged why prisoners charged with high treason should not be placed on the same footing as other prisoners.

§ 1275. Independently of the powers expressly granted to the judges by the Acts above mentioned, the King's Bench Division of the High Court would seem, at common law (*h*), to possess the right of awarding writs of *habeas corpus ad testificandum* in certain cases, though the extent of such authority is not distinctly defined. The Legislature has indirectly recognised the power of the superior judges to bring persons detained in custody under civil or criminal process before magistrates, or courts of record (*i*); and the judges themselves have claimed the right of granting these writs in other analogous cases (*k*). Thus, a writ has been awarded to bring up the body of a person confined as a lunatic, for the purpose of giving evidence in a cause, on an affidavit that he was not dangerous, and was in a fit state

(*d*) Corner, Cr. Pr. 118.

(*e*) *Ex parte Cobbett*, (1858) 4 Jur. N. S. 145, Ex.

(*f*) *Langston* v. *Cotton*, (1795) Pea. Add. Cas. 21.

(*g*) *Furly* v. *Newnham*, (1780) 2 Doug. 419. Lord Mansfield stated, with respect to a prisoner of war, that application should be made to the Secretary of State. The court, however, on the Secretary of State refusing to interfere, granted a rule to show cause why the adverse party should not consent, either to admit the facts, or that the prisoner should be examined on interrogstories; adding, that if this consent should be refused, they would put off the trial from time to time, in order to give the applicant an opportunity of filing a bill in equity.

(*h*) See *R.* v. *Freind*, (1696) 13 How. St. Tr. 2, 3; *R.* v. *Burbage*, (1763) 3 Burr. 1440.

(*i*) See preamble of 43 G. 3, c. 140, and *Ex parte Griffiths*, (1822) 5 B. & Ald. 730.

(*k*) See *In re Cook*, (1845) 7 Q. B. 653; 14 L. J. M. C. 188; 68 R. R. 533, where the court refused to issue a writ of *habeas corpus* to bring up a prisoner, committed on a charge of murdering A., before a coroner's jury, who were sitting on A.'s body, for the purpose of his being *identified* by the witnesses. In this case, the judges seemed to be of opinion, that they had power to issue such writ in a case of necessity. See, also, *Daniel* v. *Thompson*, (1812) 15 East, 78; *Att.-Gen.* v. *Fadden*, (1815) 1 Price, 403

to be examined (*l*). So, a prisoner in civil custody has been brought up by *habeas corpus* for the purpose of being examined as a witness before an arbitrator (*m*). So, a *habeas corpus* has issued from the old Court of Queen's Bench to bring up a prisoner committed by that court for non-payment of a fine, to give evidence before an election committee, on an affidavit that the rule to show cause had been served on the under-sheriff, the Solicitor of the Treasury, the prisoner himself, and the party at whose suit he was in execution, and no cause being shown (*n*). On a similar application being subsequently made to the court, the only difference being that the prisoner was in custody on a charge of felony, the judges doubted their power, but granted a rule *nisi*, directing notice to be given to the Attorney-General, the committing magistrate, the person having the custody of the prisoner, and all parties at whose suit he might be detained on civil process (*o*). It became unnecessary to call upon the court to make this rule absolute. Again, if the witness be in the military or naval service, and therefore not at liberty to attend without the leave of his superior officer, which he cannot obtain, he may be brought into court to testify by a writ of *habeas corpus*; but, in such case, the King's Bench Division of the High Court will refuse to award the writ, unless the affidavit states that the witness has been served with a subpœna, and is willing to attend; for a free man cannot be brought up as a prisoner against his consent (*p*). In all these cases the writ will be directed to the gaoler, sheriff, commanding officer, or other person, in whose custody, or under whose control, the witness is detained, who, on being served with it, and being paid or tendered his reasonable charges, will be bound to produce the witness according to the exigency of the writ.

§ 1276. In addition to the power to bring up a prisoner to give evidence under a writ of *habeas corpus* it was, in 1853, provided that any Secretary of State (*q*) and any judge of the High Court (*r*) may, if he think fit, "upon application by affidavit, issue a warrant or order under his hand, for bringing up any prisoner or person confined in any

(*l*) *Fennell* v. *Tait*, (1834) 1 Cr. M. R. 584; 40 R. R. 639.

(*m*) *Graham* v. *Glover*, (1855) 25 L. J. Q. B. 10; 5 E. & B. 591; 103 R. R. 639; *Marsden* v. *Overbury*, (1856) 18 C. B. 34; 25 L. J. C. P. 200; 107 R. R. 191.

(*n*) *In re Price*, (1804) 4 East, 587; 7 R. R. 637.

(*o*) *In re Pilgrim*, (1835) 3 A. & E. 485.

(*p*) *R.* v. *Roddam*, (1777) 2 Cowp. 672.

(*q*) These words were repealed by the Prison Act, 1898 (61 & 62 V. c. 41), which provides in their place (s. 11) a provision that "A Secretary of State on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice, or for the purpose of any public inquiry, may, by writing under his hand, order that the prisoner be taken to that place."

(*r*) Although the Act limited the power to the then Common Law Judges it is now assumed by the Chancery Judges also. For the practice in the Chancery Division, see *Jenks* v. *Ditton*, (1897) 76 L. T. 591.

gaol, prison, or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of Her Majesty's Superior Courts of Law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

§ 1277. Somewhat similar provisions have long been in force in Ireland, under section 2 of the statute 38 G. 3, c. 26, which enacts, that "it shall be lawful for the justices of Assize, or Nisi Prius, or the Commissioners of Oyer and Terminer and Gaol Delivery, by order in writing to be by them respectively signed, to direct any person in execution, and in the custody of any sheriff or other officer, in any county wherein they shall sit, to be brought up for the purpose of giving evidence in any cause or trial to be had before them respectively." So the Court of Bankruptcy in Ireland is empowered by warrant or order to cause any bankrupt, or any person supposed to be possessed of his goods, or to be indebted to him, or to be acquainted with his dealings, to be brought from any prison in which he may be in custody for the purpose of being examined (*s*). In England, and in Ireland, too, county court judges have been intrusted, to a limited extent, with the power of ordering prisoners to be brought up as witnesses before their respective courts (*t*); and similar powers have been conferred on certain functionaries, for the purpose of bringing military convicts under special circumstances before courts-martial or civil courts as witnesses (*u*).

§ 1277A. It will now be convenient to consider the powers possessed by some courts of enforcing the attendance of witnesses either actually to appear before them, at a trial or hearing, or to take the evidence of witnesses on commission, and to enforce the attendance of witnesses before such commission.

§ 1277B. The following tribunals are possessed of one or both of these powers: (i) The Houses of Parliament, (ii) The Privy Council,

(*s*) 35 & 36 V. c. 58, s. 73. See also, s. 74, as to the costs of such removal.
(*t*) 51 & 52 V. c. 43, s. 112; 27 & 28 V. c. 99, s. 43; 40 & 41 V. c. 56, s. 3.
(*u*) 44 & 45 V. c. 58, s. 60, sub-s. 8; and s. 63, as amended by 7 Ed. 7, c. 2.

(iii) The High Court, at Assizes, and upon other occasions in its various Divisions, in its Chambers and before its examiners, (iv) Courts of Quarter Sessions, (v) Courts of Summary Jurisdiction and Justices of the Peace out of Sessions, (vi) Ecclesiastical Courts, (vii) Bankruptcy Courts, (viii) Coroners' Courts, (ix) County Courts, and (x) Arbitrators' Courts.

§ 1278. A short statement of the practice of each of these, as regards the summoning of witnesses actually to appear before them and give evidence, will accordingly be given in the above order.

§ 1279. Witnesses required to give evidence on oath before the House of Lords are served with an order of the House, signed by the clerk of the Parliaments, which directs them to attend at the bar on a certain day to be sworn and examined (*v*). When a witness is required to testify before a Lords' Committee, he is ordered to attend, not at the bar of the House, but before the particular committee. Any committee may administer an oath to the witnesses examined before it (*x*); and the committees on private bills, in the event of the House making no special order, take evidence on oath (*y*). The Select Committees, however, now examine witnesses unsworn, unless otherwise ordered by the House (*z*). The service of the order must, generally, be personal, but if the witness be purposely keeping out of the way, it is usual to direct that a service at his house shall be deemed sufficient (*a*). If he disobey this summons, the House will order him to be taken into custody, either forthwith (*b*), or after the expiration of a certain time (*c*); and if the Black Rod cannot succeed in taking him, the House will address the Crown to issue a proclamation, offering a reward for his apprehension (*d*). When the evidence of peers, peeresses, or Lords of Parliament is required, the Lord Chancellor is ordered to write letters to them, desiring their attendance to be examined as witnesses (*e*); and such persons are sworn by the Lord Chancellor at the table (*f*), while all other witnesses, if required to be examined on oath, are sworn at the bar by the officer of the House (*g*). If the witness be a member, or an officer, of the House of Commons, a message is sent to that House request-

(*v*) 66 Lords' J., 400; May, L. of Parl., ch. 16.
(*x*) 21 & 22 V. c. 78, s. 2.
(*y*) Min. of H. of L., 4 June, 1857.
(*z*) *Id.*
(*a*) 66 Lords' J., 295.
(*b*) *Id.* 400.
(*c*) *Id.* 358.
(*d*) *Id.* 441.
(*e*) 75 Lords' J. 144.
(*f*) *Id.* 201.
(*g*) May, L. of Parl., ch. 16.

ing his attendance (*h*); upon which the Lower House returns answer, by its messenger, that it gives him leave to attend, adding, in case he be a member, "if he think fit" (*i*). If the witness, on attending, refuse to be sworn, or prevaricate, or otherwise misbehave, he will be punished by the House as for contempt; and if he give false evidence after being sworn, he may be indicted for perjury (*k*).

§ 1280. In the House of Commons the course is very similar, witnesses being summoned to attend by an order of the House signed by the clerk, which is either personally served upon them, or, if they live at a distance, is forwarded to them by post, or sometimes by a special messenger. If, after service, the witness neglect to attend, or if he abscond, the Speaker, by order of the House, will issue his warrant, directing the Serjeant-at-arms to apprehend the witness, and to bring him to the bar; whereupon he will generally be committed to prison; as will also all persons who aid him in his endeavours to keep out of the way (*l*). If the attendance of a Lord of Parliament or of an officer of the Upper House be desired, the Commons adopt the same form of proceeding as that adopted by the Lords, when they require the attendance of a member of the Lower House (*m*); but whether this form be necessary, if the witness be simply a peer or peeress, is a matter upon which the two branches of the Legislature appear to be at issue (*n*). If the testimony of a member be desired by the House, or by a committee of the whole House, he is ordered to attend in his place; but if he be required to give evidence before a select committee, such committee should request his attendance, and if he refuse to appear, should acquaint the House therewith, who will then order him to attend, and, if necessary, will even commit him to the custody of the Serjeant-at-arms, that he may be forthcoming at the proper time (*o*). If a person in custody is required to give evidence, the Speaker usually issues his warrant, which is personally served on the gaoler by a messenger of the House, and by which he is directed to bring the witness in his custody to be examined (*p*). Some doubts, however, have been entertained as to the legality of this course, and on one or two occasions, writs of *habeas corpus ad testificandum* have, in order to protect the gaoler, been

(*h*) 75 Lords' J. 157.
(*i*) *Id.* 164.
(*k*) May, L. of Parl., ch. 16.
(*l*) May, L. of Parl., ch. 16; *Gossett* v. *Howard*, (1847) 10 Q. B. 359, 411, 451; 16 L. J. Q. B. 345; 74 R. R. 363.
(*m*) May, L. of Parl., ch. 16; 83 Com. J. 278; 91 *id.* 75; 82 *id.* 465.
(*n*) May, L. of Parl., ch. 16; 4 Lords' J. 812.
(*o*) May, L. of Parl., ch. 16.
(*p*) *Id.*; 90 Com. J. 533. The order of the House of Lords has been used for the same purpose, May, L. of Parl., ch. 16.

applied for in the Court of Queen's Bench (*q*). If the witness is to be examined before a Select Committee, the chairman, by direction of the committee, in general signs an order for his attendance; and if this order be disobeyed, his conduct is reported to the House, which immediately issues the usual order, to be enforced as in other cases. The attendance of a witness before a committee on a private bill can only be enforced by an order of the House (*r*).

§ 1281. Under the Parliamentary Witnesses Oaths Act, 1871 (*s*), the House of Commons is now empowered to administer an oath to the witnesses examined at the bar of the House, and any committee of the House may administer an oath to the witnesses examined before such committee. Any oath under the Act may be administered by the Speaker (*t*), or, in the case of a witness before the House or a committee of the whole House, by the clerk at the table (*u*); and any witness before a select committee may be sworn by the chairman, or by the clerk attending such committee (*v*). Any attempt to intimidate a witness summoned before a committee of either House or a Royal Commission is a misdemeanour, and the person committing it is liable, not only to a fine not exceeding £100 and to three months imprisonment, but also to be ordered to make compensation to the witness (*x*).

§ 1282. In the second place, witnesses are forced to attend before the Judicial Committee of the Privy Council by the President of the Council requiring the attendance of such witnesses, and the production of any deeds, evidences, or writings, by writ issued by him in the same form, as nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by the High Court; and every person disobeying such writ is considered as in contempt of the Judicial Committee, and liable to the same penalties and consequences as if such writ had issued out of the King's Bench Division of the High Court; and may be sued for such penalties in that court (*y*).

§ 1283. The third subject for consideration is as to how the attendance of witnesses is secured at Assizes and at sittings of the High

(*q*) See *ante*, § 1275; *In re Price*, (1804) 4 East, 587; *In re Pilgrim*, (1835) 3 A. & E. 485.
(*r*) May, L. of Parl., ch. 16; 98 Com. J. 153, 174, 279, 288.
(*s*) 34 & 35 V. c. 83, s. 1.
(*t*) *Id.*
(*u*) Stand. Ord. passed 20 Feb., 1872.
(*v*) *Id.*
(*x*) See the Witnesses (Public Inquiries) Protection Act, 1892 (55 & 56 V. c. 64).
(*y*) See 3 & 4 W. 4, c. 41, s. 19.

Court. In criminal cases this is done either by a recognizance (*z*) or by a subpœna being issued from the Crown Office (*a*) and served upon him; and in civil cases it is effected by a subpœna being issued out of the Central Office (*b*). It has been enacted that "the service in any part of Great Britain or Ireland of any writ of *subpœna ad testificandum*, or *subpœna duces tecum*, issued under seal of the Admiralty Division, shall be as effectual as if the same had been served in England or Wales" (*c*). The Divorce Division of the High Court in England "may, under its seal, issue writs of subpœna or *subpœna duces tecum*, commanding the attendance of witnesses at such time and place as shall be therein expressed; and such writs may be served in any part of Great Britain or Ireland: and every person served with such writ shall be bound to attend and to be sworn and give evidence in obedience thereto in the same manner as writs of subpœna or *subpœna duces tecum* issued from any of the said superior courts of common law and served in Great Britain or Ireland" (*d*). The attendance of witnesses and the production of documents are now enforced in the Probate Division of the High Court by the ordinary writs of *subpœna ad testificandum* and *subpœna duces tecum*, which are issued by the High Court, and "every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding £100" (*e*).

§ 1284. The attendance of a witness for the purpose of proceedings in Chambers is enforced by means of a subpœna, which issues from the Central Office upon a note from the judge (*f*). Again, when a Master (*g*) is directed by a judge in the Chancery Division to examine any party or witness, he is authorised to enforce the attendance of such party or witness by summons (*h*); and if this summons be not obeyed, the party or witness will be liable to process of contempt, in like manner as he would be, were he to disobey any order of the

(*z*) See *ante*, §§ 1234, *et seq.*

(*a*) Or by the Clerk of Assize. *Ante*, § 1249.

(*b*) See *ante*, §§ 1239, 1265. As to cases in bankruptcy, see *infra*, § 1289.

(*c*) 24 & 25 V. c. 10, s. 21. See a similar enactment in the Court of Admiralty (Ireland) Act, 1867 (30 & 31 V. c. 114, s. 69).

(*d*) 20 & 21 V. c. 85, s. 49. See Divorce Rules, 109, 180.

(*e*) 20 & 21 V. c. 77, s. 24; 20 & 21 V. c. 79, s. 29. See, also, *Shepheard* v. *Beetham*, (1872) L. R. 2 P. & D. 384. 21 & 22 V. c. 95, s. 23, empowers the registrars of the Principal Registry of the Court of Probate in England, whether any suit or proceeding be pending in the court or not, to issue subpœnas, requiring any persons to produce testamentary papers. See, also, *ante*, § 1265.

(*f*) Ord. XXXVII., R. 28.

(*g*) As to the attendance of witnesses before "the Taxing Officers of the Supreme Court, or of any Division thereof," see Ord. LXV., R. 27, sub-s. 25.

(*h*) See Ord. LV., R. 24. This summons is only good for one attendance, unless the examination of the witness be adjourned; *Lawson* v. *Stoddart*, (1863) 3 New R. 211.

court, or any writ of subpœna (*i*). A witness, also, who refuses to be sworn, when summoned before a Master, does so at the risk of being committed by the court (*k*); and if he answers in an unsatisfactory manner, an application should be made to have him examined by the judge (*l*). He may, too, as it seems, himself apply to the Master, on special grounds, either to have the assistance of counsel, or to have the inquiry adjourned into court (*m*).

§ 1285. The attendance of a witness before an examiner of the High Court is provided for by Order XXXVII. (*n*). An examiner has power to administer an oath (*o*).

§ 1286. Under the Companies (Consolidation) Act, 1908, the High Court is empowered to wind up the affairs of any company, and such court and the commissioners who are authorised to take evidence, may respectively enforce the attendance of witnesses (*p*), and the production of documents (*q*), by summons and warrant. The summons cannot be claimed as a matter of right, but the court must be satisfied that to grant it will be just and beneficial (*r*). As a general rule the examination of the witness rests with the official liquidator, but the court, in its discretion, may empower any contributories to issue summonses, to attend the inquiry, and to examine or cross-examine the persons summoned (*s*). The practice in these cases has been assimilated to that in bankruptcy, and the judges, are inclined to put a liberal interpretation upon the language of this statute, which enables them to summon "any person whom the court may deem

(*i*) Ord. LV., Rr. 16, 17.

(*k*) *In re Electric Telegraph Co. of Ireland, Ex parte Bunn*, (1857) 26 L. J. Ch. 614; 24 Beav. 137; 116 R. R. 138.

(*l*) *Hayward* v. *Hayward*, (1854) Kay, App. xxxi.; 23 L. J. Ch. 549; 101 R. R. 851. See, however, *Venables* v. *Schweitzer*, (1873) L. R. 16 Eq. 76; 42 L. J. Ch. 389.

(*m*) *In re Electric Telegraph Co. of Ireland, Ex parte Bunn, supra.*

(*n*) See rr. 5—7, *infra*, § 1311.

(*o*) See Ord. XXXVII., r. 19.

(*p*) 8 Ed. 7, c. 69, ss. 174, 193, 226. See *Swan's Case*, (1870) 10 Eq. 675; *In re English Joint Stock Bank*, (1866) L. R. 3 Eq. 203; *In re Financial Ins. Co.*, (1867) 36 L. J. Ch. 687; *In re Breech Loading Armoury Co.*, and *In re Merchants' Co.*, (1867) L. R. 4 Eq. 453; *In re Accidental and Marine Insurance Co.*, (1867) 37 L. J. Ch. 56; 5 Eq. 22; *In re Mercantile Credit Association, Clement's Case*, (1868) 37 L. J. Ch. 295; L. R. 13 Eq. 179; *In re Contract Corp.*, (1871) L. R. 6 Ch. 146; 40 L. J. Ch. 351; *Re The London Gas Meter Co.*, (1872) 41 L. J. Ch. 145; *Druitt's Case*, (1872) L. R. 14 Eq. 6; *Trower & Lawson's Case*, (1872) *id.* 8; *Forbes' Case*, (1872) 41 L. J. Ch. 467; *In re Bk. of Hindustan, Fricker's Case*, (1871) L. R. 13 Eq. 178; 41 L. J. Ch. 278; *Massey* v. *Allen*, (1879) 47 L. J. Ch. 702; 9 Ch. D. 164.

(*q*) See *Ex parte Paine & Layton*, (1869) L. R. 4 Ch. 215; 38 L. J. Ch. 305; *In re Smith, Knight, & Co.*, (1869) L. R. 4 Ch. 421; 37 L. J. Ch. 864.

(*r*) *Heiron's Case*, (1880) 15 Ch. D. 139.

(*s*) *Whitworth's Case*, (1881) 19 Ch. D. 118; 51 L. J. Ch. 71.

capable of giving information concerning the trade, dealings, affairs, or property of the company" (*t*). It would seem that a witness summoned under this enactment has no *locus standi*, unless he can establish a want of jurisdiction (*u*), to appeal against the order (*v*); and even if this be an erroneous view of the law, it is clear that a court of appeal would not interfere with the discretion of the judge, unless under extremely special circumstances (*x*). The witness, however, is entitled to be attended by his counsel or solicitor, who may ask him such questions as may be necessary to explain the evidence he has given, and who may also take notes of the proceedings for the purpose of conducting such re-examination, but for that purpose only (*y*). Any deposition, taken in accordance with the above provisions, may be used as evidence on a summons against the party by whom it has been made, but the court might possibly require that notice of the intention to read the deposition should first be given (*z*).

§ 1286A. The fourth matter for consideration is as to enforcing the attendance of witnesses before Court of Quarter Sessions. This is done either by a recognizance (*a*), or by a subpœna, issued by the clerk of the peace. This writ is only compulsory within the county or borough where it is granted, and, therefore, if the witness lives beyond these limits application must be made to the Crown Office (*b*).

§ 1286B. The fifth matter for consideration is as to enforcing the attendance of witnesses before justices. This topic is fully dealt with in §§ 1316 *et seq.*

§ 1287. The attendance of witnesses before the Ecclesiastical Courts in England is required by a *compulsory*, which is an instrument somewhat in the nature of a subpœna (*c*). If the witness on the return of this process does not appear, the court may pronounce him contumacious (*d*); and signify the same to His Majesty in Chancery within ten days (*e*). On the "significavit" being lodged

(*t*) See cases cited in last four notes. Also *Re Lisbon Steam Tramways Co.*, (1876) 2 Ch. D. 575.

(*u*) *Whitworth's Case*, (1881) 19 Ch. D. 118; 51 L. J. Ch. 71.

(*v*) *Re The Gold Co.*, (1879) 48 L. J. Ch. 650; 12 Ch. D. 82.

(*x*) *Id.*

(*y*) *In re Cambrian Mining Co.*, (1881) 51 L. J. Ch. 221; 20 Ch. D. 376

(*z*) *Pugh & Sharman's Case*, (1872) 13 Eq. 566; 41 L. J. Ch. 580.

(*a*) See *ante*, §§ 1234, *et seq.*

(*b*) See *ante*, §§ 1239, 1265.

(*c*) Coote's Eccl. Pr. 780. See the rules and regulations of the Arches Court, 1867, and Reg. Gen. of 1877, for Consist. Ct. of Lond., Ord. ix., r. 4, and Forms cited 2 P. D. 379, 382.

(*d*) *Wyllie* v. *Mott*, (1827) 1 Hag. Ecc. 34.

(*e*) 53 G. 3, c. 127, s. 1; and see 2 & 3 W. 4, c. 93, s. 1.

at the Crown Office (*f*), the offending party will be arrested and detained in custody (*g*), unless he be a Peer or Lord of Parliament, or a member of the House of Commons, until he either submit to the court, or be absolved or discharged by order of the Ecclesiastical Judge (*h*). His expenses, however, must be tendered or paid by the party calling him, as in civil proceedings before the common-law courts (*i*). The Clergy Discipline Act, 1892 (*j*), provides for the prosecution, in the Consistory Court of the diocese, of clergymen charged with certain offences. Witnesses as to any charge under the Act are summoned by a "compulsory," issued according to the ordinary practice of the Consistory Court.

§ 1288. The Public Worship Regulation Act, 1874 (*k*), adopts a different practice from that which prevails in the ordinary Ecclesiastical Courts; for,—after enacting in section 9 that in all proceedings before the Judge appointed under that Act, the evidence shall be given *viva voce*, in open court, and upon oath,—it goes on to provide, that "the judge shall have the power of a court of record, and may require and enforce the attendance of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of the High Court" (*l*).

§ 1289. The seventh subject to be considered is the mode of compelling witnesses to attend before the Courts of Bankruptcy. Such attendance is enforced in part under regulations contained in the Bankruptcy Rules, and in part under the Bankruptcy Act, 1914 (*m*). The former provide, by rule 61, that "a subpœna for the attendance of a witness shall be issued by the court at the instance of an official receiver, a trustee, a creditor, a debtor, or any applicant or respondent in any matter, with or without a clause requiring the production of books, deeds, papers, and writings in his possession or control, and in such subpœna the names of three witnesses may be inserted" (*mm*). Rule 62 then declares, that "a sealed copy of the subpœna shall be served personally on the witness by the person at whose instance the

(*f*) R. S. C. Jan., 1889.

(*g*) *Dale's Case*, (1881) 6 Q. B. D. 474; 50 L. J. Q. B. 234; and see *Green* v. *Lord Penzance*, (1881) 6 App. Cas. 657; 51 L. J. Q. B. 28.

(*h*) *Hudson* v. *Tooth*, (1877) 2 P. D. 125; 47 L. J. Q. B. 18; *Dean* v. *Green*, (1882) 8 P. D. 79.

(*i*) Ayliffe, Par. 536; 1 Ought. 121; 3 Burn, Ecc. Law, 309.

(*j*) 55 & 56 V. c. 32.

(*k*) 37 & 38 V. c. 85.

(*l*) See Rules and Orders, made under the Act, on 22nd Feb., 1879, and reported in 4 P. D. 250, 261, 283.

(*m*) 4 & 5 G. 5, c. 59.

(*mm*) See Forms 141, 142, and 143, the two former applicable in the London Bankruptcy Court, the last in the County Courts.

same is issued, or by his solicitor, or by an officer of the court, or by some person in their employ, within a reasonable time before the time of the return thereof"; while rule 63 provides, that "service of the subpœna may, where required, be proved by affidavit." Under rule 70, "The court may, in any matter, at any stage of the proceedings, order the attendance of any person, for the purpose of producing any writings or other documents named in the order, which the court may think fit to be produced"; and, further, by rule 66, it may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the court, or any officer of the court, or any other person, and at any place of any witness or person. If any person wilfully disobeys any such subpœna or order, he shall, under rule 71, "be deemed guilty of contempt of court, and may be dealt with accordingly." The refusal of a witness to be sworn, or to answer any lawful question, will be regarded also in the light of a grave contempt (*n*). Rule 72 further provides that, "any witness, other than the debtor, required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial in court (*nn*). In addition to the above general regulations, the Bankruptcy Act, 1914 (*o*), contains in section 25, a special enactment, which has been framed with the view of facilitating the discovery of the property of debtors. It is in these words:—"(1) The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon (*p*) before it the debtor, or his wife, or any person known or suspected (*q*) to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings, or property; and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings, or property (*r*). (2) If any person so summoned, after having been tendered a reasonable sum (*s*), refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting, and allowed

(*n*) *Ex parte Close, re Bennett & Glave*, (1877) 5 Ch. D. 145; 46 L. J. Bk. 81.

(*nn*) A witness cannot be committed for contempt unless a reasonable sum to cover his expenses has been tendered to him: *In re Batson*, (1894) 70 L. T. 383.

(*o*) 4 & 5 G. 5, c. 59. See also *ante*, § 1277.

(*p*) See Banktcy. F. 144.

(*q*) See *Cooper* v. *Harding*, (1845) 7 Q. B. 928; 68 R. R. 599.

(*r*) See *Ex parte Tatton, re Thorp*, (1881) 17 Ch. D. 512; 50 L. J. Ch. 792.

(*s*) The witness so summoned is not entitled to the costs of employing a solicitor or counsel, *Ex parte Waddell, in re Lutscher*, (1877) 6 Ch. D. 328, per Ct. of App.; nor to a copy of his deposition, unless he be also a creditor, *Ex parte Pratt, re Hayman*, (1882) 21 Ch. D. 439; 52 L. J. Ch. 120.

by it, the court may, by warrant (*t*), cause him to be apprehended and brought up for examination. (3) The court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property." The provisions of the above enactment have been greatly explained by rule and by judicial decision. And first, it is established by rule (*u*), that the application for a summons must be in writing, and must state shortly the grounds on which it is made; and if it be not made by the trustee, official receiver, or Board of Trade, it must be verified by affidavit. Next, though the Act mentions only the official receiver and trustee as the persons who are to apply for the summons, it seems clear from the above rule, and also from several legal decisions (*v*), that the court has power, if it be thought desirable, to act at the instance not only of the Board of Trade, but of any creditor, or of the bankrupt himself, and to order the examination of any person, including even the trustee (*x*). Thirdly, it appears—though the Act is silent on the subject—that the court has a discretion to direct, that the summons shall be served by any person who is authorised to serve a subpœna (*y*); but it is still a matter of doubt whether the summons requires personal service like the subpœna, or whether, in the event of the witness keeping out of the way, it may be served by delivery at his house. It seems, too, that the court would have no jurisdiction to order any witness brought before it to furnish an account in writing of his dealings with the bankrupt (*z*); and it is at least questionable whether it would have power to compel any person present to give evidence, unless he be attending by reason of a subpœna, a summons, or a warrant (*a*).

§ 1290. The eighth tribunal whose practice as to the attendance of witnesses must be considered, is that of Coroners' Courts. The attendance of witnesses before coroners is provided for by the Coroners Act, 1887 (*b*), which enacts (*c*) that "where a person duly summoned to give evidence at an inquest, does not, after being openly called three times, appear to such summons, or appearing refuses, without lawful excuse, to answer a question put to him, the coroner may impose on such

(*t*) See Banktcy. F. 147.

(*u*) Bankruptcy Rules, R. 74.

(*v*) *Ex parte Crossley, re Taylor*, (1872) L. R. 13 Eq. 409; 41 L. J. Bk. 35 S. C.; *Ex parte Nicholson, re Willson*, (1880) 14 Ch. D. 243; 49 L. J. Bk. 68; *Ex parte Austin*, (1876) 4 Ch. D. 13; 46 L. J. Bk. 1.

(*x*) Who in such a case must be served with notice of the application: *Re Whicker, ex parte Stevens*, (1888) 5 Morrell, 173.

(*y*) *Ex parte Bolland, re Holden*, (1874) L. R. 19 Eq. 131; 44 L. J. Bk. 9.

(*z*) *Ex parte Reynolds, re Reynolds*, (1882) 21 Ch. D. 601; 52 L. J. Ch. D. 223.

(*a*) See *ante*, § 1242, *ad fin.*

(*b*) 50 & 51 V. c. 71.

(*c*) Section 19 (2).

person a fine not exceeding forty shillings." The same Act, after authorising coroners to order medical witnesses to attend inquests, &c. (*d*), and enabling such witnesses to claim a certain remuneration for their attendance (*e*), enacts, in section 23, that where a medical practitioner fails to obey a summons of a coroner issued in pursuance of the Act he shall, unless he shows a good and sufficient cause for not having obeyed it, be liable on summary conviction, on the prosecution of the coroner or of any two of the jury, to a fine not exceeding £5.

§ 1291. The ninth matter is as to the mode of compelling witnesses to attend before the County Courts, and is regulated in part by the County Court Act, 1888 (*f*), and in part by the County Court Rules. The Act provides (*g*) that "either of the parties to any action or matter may obtain from the registrar summonses to witnesses, with or without a clause requiring the production of books, deeds, papers, and writings in the possession or control of the person summoned as a witness (*h*); and such summonses, and any summonses which are now or may be required to be served personally, may, under such regulations as may be prescribed, be served by a bailiff of the court or otherwise." Order XVIII. rule 3, of the County Court Rules, provides "(1) Summonses to witnesses to be served either in the home or in any foreign district (*i*), may be issued without leave and may also, by leave of the court, be issued in blank. (2) Summonses to witnesses may be served (a) by a bailiff of a court; or, when so requested, on the issue of the summonses; (b) by the party applying for the same, or some person in his permanent and exclusive employ; or (c) by the solicitor (*k*) of the party applying for the same, or a solicitor acting as agent for such solicitor, or some person in the employ of either of them, or some person employed by either of them to serve such summonses who might be so employed to serve a summons in an action in the High Court. (3) In any case only one name shall be inserted in any such summons." Rule 4 provides that "it shall be sufficient if a summons to a witness be

(*d*) Section 21.

(*e*) The fee to which, in Great Britain, a legally qualified medical practitioner is entitled, for attending to give evidence at an inquest, is one guinea, and for making a *post-mortem* examination of the deceased, either with or without an analysis of the contents of the stomach or intestines, and for attending to give evidence thereon, is two guineas: section 22. These sums must now be paid to the medical man by the coroner immediately after the termination of the proceedings at any inquest, and the coroner will be repaid as provided by the Coroners Act.

(*f*) 51 & 52 V. c. 43.

(*g*) Section 110.

(*h*) Forms 123, 124.

(*i*) This provision resolves a doubt which formerly existed, respecting the legality of the service when the witness lived out of the jurisdiction.

(*k*) Form 125.

served within a reasonable time; and such summons may be served by delivering the same to the witness personally, or to some person apparently not less than sixteen years old at the house or place of dwelling or place of business of the witness, or in the cases mentioned in rules 18, 19, 21, and 22 of Order VII. in the manner prescribed by those rules for the service of an ordinary summons. Provided that for the purposes of this rule a place of business shall not be deemed to be the place of business of a witness unless he is the master or one of the masters thereof." The County Court Act, 1888, enacts (*l*) that "every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made on the prescribed scale of allowances, and who shall refuse or neglect, without sufficient cause, to appear, or to produce any books, papers, or writings required by such summons to be produced, or who shall refuse to be sworn or give evidence, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn or give evidence, shall forfeit and pay such fine, not exceeding ten pounds, as the judge shall direct; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the Treasury." In addition to the above enactment, it is also provided that "the court may in any action or matter at any stage of the proceedings order the attendance of any person for the purpose of being examined or of producing to or before any examiner any writings or other documents which the court may think fit to be produced, and any person served with any such order shall be bound to attend accordingly: provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the trial" (*m*). The Act provides (*n*) that the judge may in any case where he shall think fit, upon application on an affidavit by either party, issue an order under his hand and the seal of the court for bringing up to be examined as a witness, any prisoner or person confined in any gaol, prison, or place under any sentence or under any commitment for trial or otherwise, except under process in any civil action or matter. Tender of a reasonable sum for expenses must be made to the person having custody of the prisoner.

§ 1292. Tenthly, the attendance of witnesses before ordinary arbitrators acting in England under a submission is regulated by the

(*l*) Section 111.
(*m*) Order XVIII. r. 20.
(*n*) S. 112.

Arbitration Act, 1889 (*o*), by which (*p*) "any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such writ to produce any such document which he could not be compelled to produce at the trial of an action." Where a matter has been referred to a referee, whether official or special or an officer of the court (*q*), the attendance of witnesses before him may also be "enforced by subpœna" (*r*). Where a matter in Bankruptcy is referred to arbitration, the County Court judge has jurisdiction to make an order, and issue a subpœna to compel the attendance of a witness before the arbitrator (*s*). A County Court judge sitting as arbitrator under the Workmen's Compensation Act, 1906 (*t*), or an arbitrator appointed by him under the provisions of the Act, has the same power for procuring the attendance of witnesses and the production of documents, as if the claims for compensation had been made by plaint in the County Court (*u*).

§ 1293. Besides those applicable to the ten tribunals mentioned above, provisions have been made under which the attendance of witnesses before other tribunals is secured, but it is not practically possible to enumerate the whole of these. The provisions relating to some of the principal of such tribunals are referred to in the following paragraphs.

§ 1294. The Army Act, 1881 (*v*), enacts that "every person required to give evidence before a court-martial may be summoned or ordered to attend in the prescribed manner." The Act further provides with respect to all witnesses who are "subject to military law," that if any such witness makes default in attending, or refuses to take an oath or make a solemn declaration, or refuses to produce any document in his control legally required to be produced, or refuses to answer any question to which an answer may legally be required, or is guilty of contempt, he shall on conviction by a court-martial other than the court to which he has been summoned, be liable, if an officer, to be cashiered, and if a soldier to be imprisoned, or in either case to suffer such less punishment as is mentioned in the Act (*x*). When a witness who is not subject to military law commits any of the above offences, the president of the court-martial, in the event of

(*o*) 52 & 53 V. c. 49. This Act does not extend to Scotland or Ireland.
(*p*) Section 8. See also section 18 (1).
(*q*) R. S. C. Order XXXVI. rr. 49, 55c.
(*r*) See Order XXXVI. r. 49.
(*s*) *Ex parte Bolland, re Ackary*, (1876).
(*t*) 6 Edw. 7, c. 58.
(*u*) *Id.* 2nd Sched. (4).
(*v*) 44 & 45 V. c. 58, s. 125.
(*x*) 44 & 45 V. c. 58, s. 28.

the witness having been paid or tendered the reasonable expenses of his attendance, may certify the offence "to any court of law in the part of her Majesty's dominions where it is committed, which has power to punish witnesses if guilty of like offences in that court"; and thereupon such last court shall investigate the matter, and if it seem just, punish the offender as if he had committed the offence before itself (*y*).

§ 1295. The attendance of witnesses before naval courts-martial is enforced by the Naval Discipline Act, 1866, which substantially enacts, that every person, civil, naval, or military, who may be required to give evidence, shall be summoned either by the judge-advocate, or by his deputy, or by the person duly appointed by the president of the court-martial to officiate as judge-advocate at the trial (*z*); and all witnesses so summoned who do not attend, or refuse to be sworn or to affirm, or refuse to give evidence, or to answer all such questions as the court may legally demand of them, or prevaricate, may be attached in the King's Bench Division of the High Court in London or Dublin, or in the Court of Session in Scotland, or other court of law in any of his Majesty's dominions, in like manner as if they had disobeyed the process of such courts (*a*). If the witness belong to his Majesty's navy, the court-martial, in the event of his non-attendance to give evidence on oath or affirmation, or of his prevarication, possesses also an alternative power of punishing him by any imprisonment not longer than three months; and the court-martial may also imprison him for any period not exceeding one month, if he be guilty of contempt (*b*). The statute further provides, that "every person not subject to this Act, who may be so summoned to attend, shall be allowed and paid his reasonable expenses for such attendance, under the authority of the Admiralty, or of the president of the court-martial on a foreign station" (*c*).

§ 1296. Courts for the trial of either parliamentary or municipal election petitions are empowered to subpœna and to swear witnesses, as in a trial at Nisi Prius (*d*). The judge or presiding barrister has a further power, by order under his hand, of compelling the attendance of any person as a witness who appears to him to have been concerned in the election to which the petition refers (*e*), and disobedience of such an order is, of course, a contempt of court. A judge of such a

(*y*) 44 & 45 V. c. 58, s. 126, sub-s. 1 and 3. See 6 & 7 Geo. 5, c. 33, as to compelling persons not subject to military law to attend courts of inquiry.
(*z*) 29 & 30 V. c. 109, ss. 61, 66.
(*a*) 29 & 30 V. c. 109, s. 66.
(*b*) *Id.*
(*c*) *Id.*
(*d*) 31 & 32 V. c. 125, s. 31; 45 & 46 V. c. 50, s. 94 (1).
(*e*) 31 & 32 V. c. 125, s. 32; 45 & 46 V. c. 50, s. 94 (2) (3).

court may, moreover, examine any person compelled to attend, and also any person in court, though he be not called or examined by any party to the petition (*f*); but a person so examined by a judge may be cross-examined by either the petitioner, or the respondent, or both (*g*).

§ 1297. The Act of 13 & 14 V. c. 43, contains provisions for the purpose of compelling witnesses, who live out of the jurisdiction, to attend either before the Court of Chancery of the County Palatine of Lancaster, or before the registrar of that court as well in his capacity of examiner as in that of master, or before any commissioners appointed by that court for the examination of witnesses (*h*).

§ 1298. The Irish Land Commission have all the powers vested in the Chancery Division of the High Court of Justice in Ireland for enforcing the attendance of witnesses after a tender of their expenses, the examination of witnesses orally or by affidavit, the production of documents, the issuing commissions for the examination of witnesses, and the punishing of people refusing to give evidence or to produce documents, or otherwise guilty of contempt in open court (*i*).

§ 1299. The person or persons appointed by the Secretary of State to hold an investigation of an accident in a factory or workshop under the Factory and Workshop Act, 1901 (*k*), may summon and examine witnesses on oath, and require the production of documents, and any person who without reasonable excuse and after having had the expenses to which he is entitled under the Act tendered to him, fails to comply with the summons or requisition is liable to a fine.

§ 1300. Under the Friendly Societies Act, 1896 (*l*), the chief or other registrar, to whom any dispute is referred, may administer oaths and may require the attendance of all parties concerned and of witnesses, and the production of all books and documents relating to

(*f*) *Id.*

(*g*) *Id.* The form of an order on a witness to attend may, it is suggested, be as follows :—"Court for the Trial of an Election Petition [*or* of a Municipal Election Petition] for [Title]
the day of
To A. B. [*describe the person*]. You are hereby required to attend before the above court at [*place*] on the day of , at the hour of [*or, forthwith*] to be examined as a witness in the matter of the said petition, and to attend the said court until your examination shall have been completed. As witness my hand, M. N., judge of the said court [or A. B., the barrister to whom the trial of the said petition is assigned]." On the subject generally, see L. R. 4 C. P. 781; L. R. 7 C. P. 677.

(*h*) See sections 17 and 18.

(*i*) 44 & 45 V. c. 49, s. 48 (3).

(*k*) 1 Edw. 7, c. 22, s. 22.

(*l*) 59 & 60 V. c. 25.

the matter in question (*m*). A person who refuses to attend or to produce any documents or to give evidence is guilty of an offence under the Act (*n*).

§ 1302. Under the Land Transfer Act, 1875, the registrar, or any of his officers, "authorised by him in writing," may administer oaths, and "by summons under the seal of the office" may require the attendance of witnesses, and the production of documents; and if any person, after the delivery to him of such summons, and the payment or tender of his reasonable charges, wilfully neglects or refuses to attend, or produce documents, or give evidence, he is liable to a penalty not exceeding £20, to be recovered on summary conviction (*o*).

§ 1309. Besides the power for compelling the actual attendance of witnesses before a court at the trial or hearing which have now been considered, various powers also exist under which certain courts may grant commissions to take the evidence of witnesses, and may enforce the attendance of the witnesses desired to be examined and the production by them in evidence of any documents which it may be desired to have in evidence.

§ 1310. It has been stated in a former part of this work (*p*), that under the provisions of the Acts of 1 W. 4, c. 22, and 3 & 4 V. c. 105, s. 66, the judges of the High Court, whether in England or in Ireland, are respectively authorised to grant writs of mandamus or commissions to the judges of the colonies, and of other places under his Majesty's dominion, empowering them to examine witnesses in certain cases; and section 2 of the former, and section 67 of the latter Act, respectively provide, that whenever any such writ or commission shall issue, "the judge or judges, to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court, whereof they are judges, does or may possess for that purpose in causes or suits depending in such court."

§ 1311. It has further been shown (*q*), that the judges of the High Court may, under Order XXXVII. rr. 5 and 7, order witnesses to be examined, or to produce documents (*r*), before any

(*m*) Section 68 (4).
(*n*) Section 84.
(*o*) 38 & 39 V. c. 87, ss. 109, 110.
(*p*) *Ante*, §§ 500—505.
(*q*) *Ante*, § 506.
(*r*) An order will not be made under rule 7 against a person not a party before trial except for the purpose of a particular motion or proceeding: *Elder* v. *Carter*, (1890) 25 Q. B. D. 194; 59 L. J. Q. B. 281; *O'Shea* v. *Wood*, [1891] P. 237, 286; 60 L. J. P. 83; *Central News Co.* v. *Eastern Telegraph Co.*, (1884) 53 L. J. Q. B. 236; *Straker* v. *Reynolds*, (1889) 22 Q. B. D. 262; 58 L. J. Q. B. 180.

officer of the court, or other person appointed, and at any place; and under rule 8, the wilful disobedience of any such order is deemed a contempt of court. Rule 9 provides that any person whose attendance shall be so required shall be entitled to the like conduct-money, and payment for expenses, and loss of time, as upon attendance at a trial; and, by virtue of rule 7, no person can be compelled to produce under any such order any document that he would not be compellable to produce at the hearing or trial. Under rule 17 the examiner may, and if need be, shall make a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon; and the court or a judge may direct such proceedings, and make such order as, upon the report, they or he may think just. When an inquiry respecting the amount of unliquidated damages is directed to be had before an officer of the court, "the attendance of witnesses, and the production of documents before such officer may be compelled by subpœna" (*s*).

§ 1312. An Act was passed in the year 1843 (*t*), which—after reciting that "there are at present no means of compelling the attendance of persons to be examined under any commission for the examination of witnesses issued by the courts of law or equity in England or Ireland, or by the courts of law in Scotland, to be executed in a part of the realm subject to different laws from that in which such commissions are issued, and great inconvenience may arise by reason thereof"—enacts in section 5, that "if any person, after being served with a written notice to attend any commissioner or commissioners appointed to execute any such commission for the examination of witnesses as aforesaid (such notice being signed by the commissioner or commissioners, and specifying the time and place of attendance), shall refuse or fail to appear and be examined under such commission, such refusal or failure to appear shall be certified by such commissioner or commissioners; and it shall thereupon be competent, to or on behalf of any party suing out such commission, to apply to any of the superior courts of law in that part of the kingdom within which such commission is to be executed, or any one of the judges of such courts, for a rule or order to compel the person or persons so refusing or failing as aforesaid (*u*), to appear before such commissioner or commissioners, and to be examined under such commission; and it shall be lawful for the court or judge to whom such application shall be made, by rule or order to command the attendance and examination of any person to be named, or the production of any writings or documents to be men-

(*s*) Order XXXVI. r. 57.

(*t*) 6 & 7 V. c. 82.

(*u*) Under this enactment there is no power to make an order on persons not parties to produce documents otherwise than as ancillary to the examination of such persons as witnesses:—not by way of discovery of documents. See *Burchard* v. *Macfarlane*, [1891] 2 Q. B. 241; 60 L. J. Q. B. 587.

tioned, in such rule or order." Section 6 further enacts, that "upon the service of such rule or order upon the person named therein, if he or she shall not appear before such commissioner or commissioners as aforesaid for examination, or to produce the writings or documents mentioned in such rule or order, the disobedience to such rule or order shall, if the same shall happen in England or in Ireland, render the person disobeying subject and liable to such pains and penalties as he or she would be subject and liable to by reason of disobedience to a writ of subpœna in England or in Ireland; and if such disobedience shall happen in Scotland, it shall be competent to the Lord Ordinary on the bills, upon an application made to him, by or on behalf of any party suing out such commission, and upon proof of such disobedience made before him, to direct the issue of letters of second diligence, according to the forms of the law of Scotland, to be used against the person disobeying such rule or order." Section 7 then provides, that "every person, whose attendance shall be so required, shall be entitled to the like conduct-money and payment of expenses and for loss of time, as for and upon attendance at any trial in a court of law; and that no person shall be compelled to produce under such rule or order any writing or other document, that he or she would not be compellable to produce at a trial, nor to attend on more than two consecutive days, to be named in such rule or order."

§ 1313. In 1856, the Foreign Tribunals Evidence Act, 1856 (*v*), was passed, the object of which was to afford facilities for taking evidence in his Majesty's dominions,—not indeed in reference to all proceedings, criminal (*x*) as well as civil, which may be pending before foreign tribunals,—but in relation exclusively to civil and commercial matters. For this purpose the statute authorises the judges of certain superior courts in England, Ireland, Scotland, and the colonies, on application being made to them on behalf of any foreign court, "before which any civil or commercial matter is pending," to order any witnesses within the jurisdiction of their respective courts to attend before, and to be examined by, such persons as shall be named in the order; and the examiners are empowered to administer all necessary oaths. The Act further provides, that the witnesses, as at an ordinary trial, shall be entitled to conduct-money, and shall be protected from answering criminatory questions, and from producing documents which they are privileged to withhold. The evidence taken in pursuance of this Act, for the purposes of a foreign action, need not be limited to what is admissible according to the English laws of evidence (*y*). The above Act is, by the Extradition Act, 1870 (*z*),

(*v*) 19 & 20 V. c. 113.
(*x*) As to criminal proceedings, see *post*, § 1315.
(*y*) *Disilla* v. *Fells & Co.*, (1879) 40 L. T. 423.
(*z*) 33 & 34 V. c. 52.

extended to proceedings for any criminal matter which are not of a political character, which may be pending before a foreign court. Where an order had been made under this Act for the examination of a witness and the production of documents by him, and it was sought to attach him for refusing to produce material documents of which he had actual possession, custody, and control, only in the character of servant to a master, who was not a party to the proceedings, and the witness swore as his reason for not producing them that in his opinion, if he were to produce them he would violate his duty towards his master, the court not being satisfied that the production of the documents would not be a violation of the witness's duty to his master, refused to attach him, although he had not been expressly forbidden by his master to produce them, and had not asked and declined to ask for his master's permission to do so (*a*).

§ 1314. In 1859 the Evidence by Commission Act was passed (*b*), which,—after reciting that it is expedient to afford facilities "for taking evidence in, or in relation to, actions, suits, and proceedings pending before tribunals in her Majesty's dominions, in places in such dominions out of the jurisdiction of such tribunals,"—goes on to enact, in substance, that whenever any court in her Majesty's dominions shall have authorised, by commission, order, or other process, the obtaining of the testimony of any witness out of its jurisdiction, in or in relation to any action, suit, or proceeding pending in such court, certain superior judges enumerated in the Act shall be empowered,—provided the witness be living within their jurisdiction,—to command his attendance before the appointed commissioners, to order his examination, and to give all other necessary directions on the subject (*c*). The witness, as in the two preceding Acts, may claim the payment of his charges, and the usual protection with respect to the answering of questions and the production of papers.

§ 1315. The Evidence by Commission Act, 1885 (*d*), in any proceedings to which the Evidence by Commission Act, 1859, applies, enables any Indian or Colonial court, or judge, to whom the com-

(*a*) *Eccles* v. *Louisville, &c., Ry.*, [1912] 1 K. B. 135; 81 L. J. K. B 445. It would seem from the manner in which the majority of the court (Vaughan Williams and Buckley, L.JJ.) dealt with the decisions upon subpœnas *duces tecum* that they desired to leave open the question whether and how far such decisions are governing authorities under this Act. Kennedy, L.J., who dissented, treated them as applicable. It is thought that considerations applicable to either procedure are sufficiently common to both to render *Eccles' Case* an authority applicable to subpœnas *duces tecum*, and the cases decided as to subpœnas *duces tecum* applicable to examinations under this Act. As to the decisions on subpœnas *duces tecum*, see *ante*, § 1240.

(*b*) 22 V. c. 20.

(*c*) See *Campbell* v. *Att.-Gen.*, (1867) L. R. 2 Ch. 571; 36 L. J. Ch. 600.

(*d*) 48 & 49 V. c. 74.

mission, &c., is addressed, to nominate, in civil cases, a fit person (*e*), and, in criminal cases, a judge or magistrate (*f*), to take the examination of the required witness. The provisions of the Evidence by Commission Act, 1859, are to apply to proceedings under the Act of 1885 (*g*), and under both Acts there is a power to make rules.

§ 1315A. County Court judges possess the power of ordering the examination of witnesses out of court, but only in England or Wales (*h*), except in cases where the court is exercising a bankruptcy jurisdiction when the power extends to the ordering a commission abroad (*i*). An order for the examination of witnesses abroad can be made by the Mayor's Court of London (*k*), and by an official referee to whom an action has been referred (*l*). An order can also be made where a dispute has been compulsorily referred to arbitration under section 192 of the Companies (Consolidation) Act, 1908 (*m*), but not where parties have agreed to refer their disputes to arbitration, no action having been brought. In the latter case neither the arbitrator nor a judge has any power to make such an order (*n*); the court will not assist "a mere domestic forum" (*o*).

§ 1316. The Indictable Offences Act, 1848 (*p*), and the Summary Jurisdiction Act, 1848 (*q*), contain clauses regulating, in two large classes of cases, the mode of enforcing the attendance of witnesses before *Justices of the Peace*. The first-named Act,—which was passed to facilitate the performance of duties by magistrates out of session with respect to persons charged with indictable offences,—enacts, in section 16, that "if it shall be made to appear to any justice of the peace by the oath or affirmation of any credible person, that any person within the jurisdiction of such justice is likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as a witness at the time and place appointed for the examination of the witnesses against the accused, such justice may and is hereby required to issue his summons (*r*) to such person, under his hand and seal, requiring him to be and appear

(*e*) Section 2.
(*f*) Section 3.
(*g*) Section 4.
(*h*) County Court Rules, Ord. XVIII., rr. 18-32.
(*i*) 5 & 6 G. 5, c. 59, s. 109 (5).
(*k*) The Mayor's Court of London Procedure Act, 1857 (20 & 21 V. c. 157), s. 26.
(*l*) *Hayward* v. *Mutual Reserve Association*, [1891] 2 Q. B. 236.
(*m*) 8 Edw. 7, c. 69; *Re Mysore West Gold Co.*, (1889) 42 Ch. D. 535; 58 L. J. Ch. 731.
(*n*) *Re Shaw and Ronaldson*, [1892] 1 Q. B. 91; 61 L. J. Q. B. 141.
(*o*) Per Chitty, J., in *Re Mysore West Gold Co.*, *supra*.
(*p*) 11 & 12 V. c. 42.
(*q*) 11 & 12 V. c. 43.
(*r*) See form in Sch. to Act, L. 1.

at a time and place mentioned in such summons before the said justice, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify what he shall know concerning the charge made against such accused party; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by the said summons, and no just excuse shall be offered for such neglect or refusal, then (after proof upon oath or affirmation of such summons having been served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode) it shall be lawful for the justice or justices, before whom such person should have appeared, to issue a warrant (*s*) under his or their hands and seals, to bring and have such person at a time and place to be therein mentioned before the justice who issued the said summons, or before such other justice or justices of the peace for the same county, riding, division, liberty, city, borough, or place, as shall then be there, to testify as aforesaid, and which said warrant may, if necessary, be backed as hereinbefore is mentioned (*t*), in order to its being executed out of the jurisdiction of the justice who shall have issued the same; or if such justice shall be satisfied by evidence upon oath or affirmation that it is probable that such person will not attend to give evidence without being compelled so to do, then, instead of issuing such summons, it shall be lawful for him to issue his warrant (*u*) in the first instance, and which, if necessary, may be backed as aforesaid (*v*); and if on the appearance of such person so summoned before the said last-mentioned justice or justices, either in obedience to the said summons, or upon being brought before him or them by virtue of the said warrant, such person shall refuse to be examined upon oath or affirmation concerning the premises, or shall refuse to take such oath or affirmation, or, having taken such oath or affirmation, shall refuse to answer such questions concerning the premises as shall then be put to him, without offering any just excuse for such refusal, any justice of the peace then present, and having there jurisdiction, may by warrant (*x*) under his hand and seal *commit* the person so refusing to the common gaol or house of correction for the county, riding, liberty, city, borough, or place, where such person so refusing shall then be, there to remain and be imprisoned for any time not exceeding *seven days*, unless he shall in the meantime consent to be examined and to answer concerning the premises."

§ 1317. The Act of 11 & 12 V., c. 43,—which, subject to a few

(*s*) See *id.* L. 2.
(*t*) As to the backing of these warrants, see *post*, § 1318.
(*u*) See form in Sch. to Act, L. 3.
(*v*) See *post*, § 1318.
(*x*) See form in Sch. to Act, L. 4.

exceptions to be presently mentioned (*y*), relates to summary convictions and orders by justices out of sessions,—contains, in section 7, similar provisions for enforcing the attendance of witnesses; excepting only that, before the justice can issue his warrant for the apprehension of a witness who has disobeyed a summons, proof upon oath or affirmation must be given that "a reasonable sum was paid or tendered to the witness for his costs and expenses in that behalf."

§ 1317A. The Criminal Justice Administration Act, 1914 (*z*), enacts that these sections referred to in the last two paragraphs "shall be deemed to include the power to summon and require a witness to produce to such court books, plans, papers, documents, articles, goods, and things likely to be material evidence on the hearing of any charge, information, or complaint, and the provisions of those sections relating to the neglect or refusal of a witness, without just excuse, to attend to give evidence, or to be sworn, or to give evidence shall apply accordingly.

§ 1318. If the witness against whom any warrant shall be issued under either of these Acts shall not be found within the jurisdiction of the justice issuing the same, or "if he shall escape, go into, reside, or be, or be supposed or suspected to be, in any place beyond such jurisdiction, whether in England, Wales, Ireland, Scotland, or the Channel Islands, any justice or other officer, within whose jurisdiction the witness shall be, or be supposed to be, may, "upon proof alone being made on oath of the handwriting of the justice issuing such warrant," make an indorsement (*a*) on the same, authorising its execution within his jurisdiction; and the warrant so backed may then be executed as if it had originally issued in such last-mentioned place (*b*).

§ 1318A. Where a court of summary jurisdiction would have power to issue a summons to a witness, provided he were within the jurisdiction, it may now, though the witness be out of the jurisdiction, still issue the summons if the witness be in England; and any court of summary jurisdiction for the place in which the witness is believed to be, may, on proof on oath of the signature of the summons, indorse it; and the witness, on being served with the summons so indorsed, and being paid or tendered a reasonable sum for his expenses, must attend the court on pain of being apprehended (*c*).

(*y*) *Post*, § 1319.
(*z*) 4 & 5 G. 5, c. 58, s. 29.
(*a*) See form in Sch. K to 11 & 12 V. c. 42.
(*b*) 11 and 12 V. c. 42, ss. 11—16; 11 & 12 V. c. 43, ss. 3, 7.
(*c*) 42 & 43 V. c. 49, s. 36.

§ 1319. It has been stated just above, that the Summary Jurisdiction Act, 1848, does not apply to all summary convictions and orders. The main *exceptions* are pointed out in section 35 of the Act, as amended by the Second Schedule of the Summary Jurisdiction Act, 1879 (*d*), and consist of orders of removal; orders relating to lunatics; and bastardy orders and warrants. With respect, however, to orders of removal and bastardy orders, justices may enforce the attendance of witnesses by summons and warrant under 7 & 8 V., c. 101, s. 70, which enacts, that, "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of that Act, or of any of the Acts required to be construed as one Act therewith (*e*) if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice to *summon* such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by *warrant* under his hand and seal, to require such person to be brought before him, or any justice before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon, it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined; and, in case of such submission, the order of any such justice shall be a sufficient warrant for the discharge of such person."

§ 1320. The present Lunacy Acts also contain a clause enabling a "judicial authority" acting under the Acts to enforce the attendance of witnesses (*f*). The attendance of persons to give evidence before Masters in Lunacy may, in the matter of any lunatic, be enforced by summons; and every person so summoned is bound to attend as required by the summons (*g*).

§ 1322. Notwithstanding the general language of the Acts which empower justices to compel the attendance of witnesses by summons and warrant, it is clear that they can, in general, only exercise this

(*d*) 42 & 43 V. c. 49.

(*e*) That is, 5 & 6 V. c. 57; 4 & 5 W. 4, c. 76; 5 & 6 W. 4, c. 69; 6 & 7 W. 4, c. 96; 1 & 2 V. c. 25, s. 2; 7 W. 4 & 1 V. c. 50; and 2 & 3 V. c. 84.

(*f*) 53 V. c. 5, s. 9; 54 & 55 V. c. 65, Sch.

(*g*) 53 V. c. 5, s. 114.

power within the limits of their own jurisdiction; and therefore, whenever the witness lives beyond such limits, recourse must be had, either to the cumbrous system of backed warrants (*h*), or at least, of backed summonses (*i*), or to the Central Office subpœna, except in the very few instances where, as in the Acts relating to the excise (*k*) and customs (*l*), power is expressly given to the justices to issue process beyond their jurisdiction.

§ 1324. Several Acts of Parliament give to boards, commissioners, inspectors, sheriffs, and other officers, more or less stringent powers to enforce the attendance of witnesses before them. Thus, whenever it is necessary for the Board of Customs, or their officers, to institute an inquiry relating to any business under their management, they are empowered to summon any person required as a witness to appear before them and to give evidence on oath; and if such person, having his reasonable expenses tendered to him, refuses to attend, or otherwise misbehaves, he renders himself liable to a penalty of five pounds (*m*). The Ministry of Health, in whom all the powers of the late English Poor Law Board are now vested (*n*), the Local Government Board for Ireland (*o*), who now represent the late Irish Poor Law Commissioners, and the General Prisons Board for Ireland, and the inspectors respectively appointed by these bodies, may summon any person for the purpose of being examined upon any matter under their control, or of producing or verifying any document relating to such matter; and in the event of such person disobeying such summons, or refusing to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce, any such document, he shall be deemed guilty of misdemeanour: Provided always, that no person shall be required to travel more than ten miles in England, or twenty miles in Ireland, from his place of abode; and if he be summoned by an English inspector, he shall be allowed his expenses (*p*). The commissioners and inspectors under the Charitable Trusts Acts of 1853 and 1855 (*q*), the Charity Commissioners, and Assistant Charity Commissioners, who now exercise the powers (*r*) originally conferred on the Commissioners and Assistant Commis-

(*h*) *Ante*, § 1318.

(*i*) *Ante*, § 1318A.

(*k*) 7 & 8 G. 4, c. 53, s. 74, empowers the commissioners of excise, the justices, and the commissioners of appeal, to summon any witness, "in whatever part of the United Kingdom he may reside or be."

(*l*) 39 & 40 V. c. 36, s. 227.

(*m*) 39 & 40 V. c. 36, ss. 36, 37.

(*n*) 34 & 35 V. c. 70, s. 2; 9 & 10 G. 5, c. 21.

(*o*) 35 & 36 V. c. 69, s. 5.

(*p*) 10 & 11 V. c. 109, ss. 11, 21, 26; 10 & 11 V. c. 90, ss. 19, 20; 14 & 15 V. c. 68, ss. 16, 17; 40 & 41 V. c. 49, s. 11.

(*q*) See and compare 16 & 17 V. c. 137, ss. 10—14, and 18 & 19 V. c. 124, ss. 6—9.

(*r*) 37 & 38 V. c. 87, s. 1.

sioners under the Endowed Schools Act, 1869 (*s*), and the inspectors and courts holding investigations under the Regulation of Railways Act, 1871 (*t*), possess somewhat similar powers for enforcing the attendance of particular witnesses. The Special Commissioners for Irish Fisheries are intrusted with very peculiar powers; and for the purpose of enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents, they have all such rights as the judges of the King's Bench in Ireland have for the like purposes (*u*).

§ 1325. Again, the Board of Agriculture, or any officer of the Board for the time being assigned for that purpose, may, by summons, under the seal of the Board, or under the hand of such officer, require the attendance of witnesses before themselves, or if the summons be under seal, before the valuer; and every such witness, in case of disobedience, or other misconduct in refusing to be sworn or to give evidence, is liable to a penalty not exceeding ten pounds, to be levied and recovered before two justices of the county in which the land to be inclosed is situate; and he will also be deemed guilty of misdemeanour; but he must be paid or tendered the reasonable charges of his attendance, and he need not travel above ten miles from the place of his abode (*v*). So, when landowners refuse to treat with commissioners of sewers, these last may issue their warrants to the sheriff to empanel a compensation jury to attend the sessions; and, thereupon, the Clerk of the Peace, or his deputy, shall summon all such persons as shall be thought necessary to be examined as witnesses, who, if they do not appear, or if they refuse to be sworn or to be examined, without lawful excuse to be allowed by the sessions, shall forfeit a sum not exceeding five pounds for every such offence (*x*). So, under the Preliminary Inquiries Act, 1851, the inspectors appointed by the Lords Commissioners of the Admiralty are empowered to summon any persons, whose evidence in their judgment shall be material; and if such persons wilfully neglect or refuse to attend in pursuance of such summons, or to produce such documents as they may under the Act be required to produce, they become liable to a penalty not exceeding five pounds (*y*). So, every inspector appointed under the Merchant Shipping Act, 1894, may, by summons under his hand, require the attendance of witnesses before him; and every person who refuses to obey such summons, after having his

(*s*) 32 & 33 V. c. 56, s. 49.
(*t*) 34 & 35 V. c. 78, ss. 4, 7, 11, 15.
(*u*) 26 & 27 V. c. 114, s. 38; amended by 32 & 33 V. c. 92.
(*v*) 8 & 9 V. c. 118, ss. 9, 39, 40, 159, 164; 52 & 53 V. c. 30, ss. 2, 11.
(*x*) 3 & 4 W. 4, c. 22, ss. 26, 27. S. 29 provides by whom the costs of the witnesses are to be paid. See 4 & 5 V. c. 45, ss. 13, 14.
(*y*) 14 & 15 V. c. 49, ss. 4, 5.

expenses tendered to him, becomes liable to a penalty not exceeding ten pounds (*z*).

§ 1326. Commissioners, authorised to inquire into the existence of corrupt practices at elections for members of Parliament, may, by a summons under their hands and seals, or under the hand and seal of one of them, require the attendance of witnesses, and the production of such books, papers, deeds, and writings as they may deem necessary (*a*); and if any such summons be disobeyed, the commissioners may certify the default to one of the superior courts, who will deal with the offender as if he had disobeyed an ordinary subpœna (*b*).

§ 1330. In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceeding (*c*); but—in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance (*d*),—they are (*e*) protected from arrest upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home (*f*); *eundo, morando, et redeundo* (*g*). Arrest on civil process, either on mesne process to hold to bail, or by way of execution after judgment (formerly effected by the old writ of *ca. sa.*) has been

(*z*) 57 & 58 V. c. 60, ss. 464, 465, 466, 729.

(*a*) 15 & 16 V. c. 57, s. 8; 31 & 32 V. c. 125, ss. 15, 56.

(*b*) 15 & 16 V. c. 57, s. 12.

(*c*) *Seaman* v. *Netherclift*, (1876) 2 C. P. D. 53; 46 L. J. C. P. 128; *Revis* v. *Smith*, (1856) 18 C. B. 126; 25 L. J. C. P. 195; 107 R. R. 236; *Henderson* v. *Broomhead*, (1859) 4 H. & N. 569; 28 L. J. Ex. 360; 118 R. R. 618; *Kennedy* v. *Hilliard*, (1859) 10 Ir. C. L. R. 195; *Gildea* v. *Brien*, (1821) *id.* 230; *Dawkins* v. *Ld. Rokeby*, (1875) L. R. 7 H. L. 744; 45 L. J. Q. B. 8; *Goffin* v. *Donelly*, (1881) 6 Q. B D. 307; *Barratt* v. *Kearns*, [1905] 1 K. B. 504. As to what tribunals confer the privilege, see cases above cited; *Royal Aquarium* v. *Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; and cases cited, *post*, § 1334. The privilege extends to communications made to a solicitor for the purpose of preparing the witnesses proof for trial: *Watson* v. *Jones*, [1905] A. C. 480; 74 L. J. P. C. 151.

(*d*) The privilege does not apply to a solicitor's clerk attending at Judge's Chambers: *Phillips* v. *Pound*, (1852) 7 Ex. 881; 21 L. J. Ex. 277.

(*e*) Gr. Ev. § 316, slightly as to six lines.

(*f*) See Cons. Ord. Ch. 1860, Ord. xlii. r. 1, which provided, that "officers and attendants upon the Court of Chancery, suitors and witnesses, are to have privilege *eundo, redeundo, et morando*, for their necessary attendance, but not otherwise; and when any of them are arrested at such times of necessary attendance, it is a contempt of court." This order is now annulled by R. S. C., 1883, and no rule has been substituted for it.

(*g*) *Meekins* v. *Smith*, (1791) 1 H. Bl. 636; *Walpole* v. *Alexander*, (1782) 3 Doug. 45. In *Ex parte Britten*, (1840) 1 Mont. D. & D. 278; 9 L. J. Bk. 38, the husband of a petitioner, who accompanied his wife to the Court of Review to attend the hearing of the petition, was held to be privileged from arrest; since, being liable to the costs of the application, he had such a relation to the suit as fully justified his attendance.

abolished, and this makes the subject of far less importance than it formerly was. Still, as under some circumstances a power of arrest in the course of civil process still exists, the law by which it is governed cannot properly be omitted. The service of a subpœna or other process is not necessary in order to afford the witness this protection, provided he has consented to come without such service (*h*), and actually does attend in good faith (*i*); and therefore, the privilege extends to a witness coming from abroad without a subpœna (*k*). In determining what constitutes a reasonable time for going, staying, and returning, the courts are disposed to be liberal; and provided it substantially appears that there has been no improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible and by the nearest route (*l*).

§ 1331. Thus the rule of protection has been held to apply, where a witness, two hours after he had left the court, was arrested about a mile off in the direct road to his house (*m*); where a defendant, who had attended his cause in the morning, went to a tavern near the court in the afternoon, to dine with his attorney and witnesses (*n*); where a party had been staying for some days at a coffee-house near the court, waiting for the trial of his cause, which was a remanet, but was not in the list of causes for the day on which the arrest happened (*o*); where a party attending an arbitration was arrested during an adjournment of the reference from one period to another of the same day (*p*); where a witness, in a cause tried on Friday afternoon, was arrested in the assize town on Saturday evening, as she was entering a stage coach which was to convey her home (*q*); where a plaintiff, on leaving court, called at his office for refreshment, and then on his way home went to his tailor's, in whose shop he was

(*h*) *Arding* v. *Flower*, (1800) 8 T. R. 536; *Ex parte Byne*, (1813) 1 Ves. & B. 320; *Rishton* v. *Nisbett*, (1834) 1 M. & Rob. 347. But see *Magnay* v. *Burt*, (1843) 5 Q. B. 393; 64 R. R. 517.

(*i*) *Meekins* v. *Smith*, (1834) 1 H. Bl. 637; *Walpole* v. *Alexander*, (1782) 3 Doug. 46.

(*k*) *Walpole* v. *Alexander*, (1782) 3 Doug. 45; *Norris* v. *Beach*, (1807) 2 Johns. 294.

(*l*) *Strong* v. *Dickenson*, (1836) 1 M. & W. 491; 5 L. J. Ex. 231; *Ricketts* v. *Gurney*, (1819) 7 Price, 704; *Willingham* v. *Matthews*, (1815) 6 Taunt. 358; *In re M'Kone*, (1841) Ir. Cir. R. 65; *Smythe* v. *Banks*, (1797) 4 Dall. 329.

(*m*) *Selby* v. *Hills*, (1832) 8 Bing. 166; 1 L. J. C. P. 55; 34 R. R. 667. See *Ex parte Clarke*, (1832) 2 Deac. & C. 99.

(*n*) *Lightfoot* v. *Cameron*, (1776) 2 W. Bl. 1113.

(*o*) *Childerston* v. *Barrett*, (1809) 11 East, 439; *Hurst's Case*, (1804) 4 Dall. 387.

(*p*) *Ex parte Temple*, (1814) 2 V. & B. 395; *Ex parte Russell*, (1812) 1 Rose, 278.

(*q*) *Holiday* v. *Pitt*, (1814) 2 Str. 986. "There she was directly on her way home. The court did not decide that she might not have been arrested at the assize town on Saturday morning." Per Alderson, B., in *Strong* v. *Dickenson*, *supra*.

arrested (*r*); and even where a witness from abroad, on finding that the trial was postponed till the next sittings, determined to wait till it came on, and was arrested on the eighth day after his arrival (*s*).

§ 1332. On the other hand, where a witness subpœnaed out of Chancery, was arrested three days before the time fixed for his examination, while going to his solicitor's office to look at the interrogatories which he would be called upon to answer (*t*); where a party having come from the country to town to attend an arbitration, remained, after an adjournment of the reference *sine die*, till the expiration of the fourth day of an approaching term, in the expectation of a motion being made by the opposite party relative to the order of reference (*u*); and where a solicitor, having been arrested during the afternoon at the Auction Mart Coffee House, swore that, having professional business in several causes at Westminster, he went into the City on his way to the courts, but omitted to state either where his house was, or when he left home (*v*);—in all these cases the courts have refused to discharge the party out of custody. So, though it seems that a witness who comes to town to be examined, is protected from arrest during the whole time that he *bona fide* remains there for the purpose of giving evidence (*x*), a witness living in London is not protected in the interval between the service of the subpœna and the day appointed for his examination (*y*). Neither can the privilege from arrest be prolonged, in consequence of the party's inability to return home for want of pecuniary means (*z*), though possibly, if the detention has been caused by illness, the court will consider this circumstance in fixing the extent of the protection (*a*). In one case, where a party in London, being summoned to attend a reference at Exeter, went, three days before the time of meeting, with his attorney to Clifton, where his wife lived, to examine documents necessary to be produced before the arbitrator, and was arrested on the second day before he had completed the arrangement of his papers, the Courts of King's Bench and Exchequer pronounced opposite decisions, the former holding that he was not, the latter that he was, privileged from arrest (*b*).

(*r*) *Pitt* v. *Coomes*, (1834) 5 B. & Ad. 1078; *Luntly* v. ——, (1833) 1 Cr. & M. 579; *Ahearne* v. *M'Guire*, (1840) 2 Ir. Eq. R. 437; *Mahon* v. *Mahon*, (1840) *id.* 440.

(*s*) *Walpole* v. *Alexander*, (1782) 3 Doug. 45. See, also, *Persse* v. *Persse*, (1853) 5 H. L. C. 671; 101 R. R. 328.

(*t*) *Gibbs* v. *Phillipson*, (1829) 1 Russ. & Myl. 19; 8 L. J. Ch. 43.

(*u*) *Spencer* v. *Newton*, (1837) 6 A. & E. 623; 6 L. J. K. B. 119.

(*v*) *Strong* v. *Dickenson*, (1836) 1 M. & W. 488. See *Walsh* v. *Wilson*, (1851) 1 Ir. Ch. R. 610.

(*x*) *Gibbs* v. *Phillipson*, *supra*.

(*y*) *Id.*

(*z*) *Spencer* v. *Newton*, *supra*.

(*a*) *Id.*

(*b*) *Randall* v. *Gurney*, (1819) 3 B. & Ald. 252, Abbott, C. J.; diss.; *Ricketts* v. *Gurney*, (1819) 7 Price, 699, per Graham and Wood, Bs., Garrow, B., diss.

§ 1333. It would seem that, in general, this protection extends only to persons arrested on civil process, for against criminal process home itself is no protection (*c*). An attachment for contempt in disobeying an order of the court made on a solicitor, is not regarded as "civil process," within the meaning of the rule (*d*), though an attachment on an ordinary suitor for non-payment of money will be viewed in that light (*e*). Whether a warrant of commitment issued out of a County Court would be regarded in the light of a criminal process, so as to justify the bailiff in arresting a witness, is a question which, after discussion, has been left undecided by the judges (*f*). In Ireland, where a witness for the Crown, attending at the Quarter Sessions, was arrested under a writ of commission of rebellion, the court out of which the process issued, while declining to express any opinion as to whether this writ was in the nature of a criminal proceeding, discharged the witness from custody, and observed that it was highly essential to the interests of the public, that witnesses in criminal courts of justice should be protected and encouraged (*g*). A witness is not privileged from being taken by his bail, even during his attendance at court, for this is not an arrest, but a retaking (*h*).

§ 1334 (*i*). This privilege, so far as parties and witnesses are concerned, will be recognised in all cases where the attendance is given in any matter pending before a lawful tribunal having jurisdiction of the cause (*k*). Thus, it has been extended to parties and witnesses attending before an arbitrator, whether he be appointed by an order of the High Court, or of a judge, or by an agreement of reference containing a clause that it may be made a rule of court; for, in all these cases the attendance of witnesses may be enforced (*l*). So, it

(*c*) Per Ld. Denman, *In re Douglas*, (1842) 3 Q. B. 837, 838. It was there held that a warrant issued upon an information *ex officio*, under the Act of 33 G. 3, c. 52, s. 62, and expressed to be to answer for certain misdemeanours whereof the party was impeached, and also for certain penalties sued for by the Att.-Gen., was criminal process, under which the party might be taken *redeundo* after discharge from illegal custody.

(*d*) *In re Freston*, (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545.

(*e*) *Id.*, and cases there cited: *Harvey* v. *Harvey*, (1884) 26 Ch. D. 644.

(*f*) *Kimpton* v. *London and North Western Ry.*, (1854) 9 Ex. 766; 23 L. J. Ex. 232; 96 R. R. 967.

(*g*) *Graves* v. *M'Carthy*, (1838) Cr. & D., Ah. C. 127.

(*h*) *Ex parte Lyne*, (1822) 3 Stark. 132; 23 R. R. 762; *Horne* v. *Swinford*, (1822) 1 D. & R. Mag. Cas. 361.

(*i*) Gr. Ev. § 317, in part.

(*k*) *Ex parte Cobbett*, (1857) 7 E. & B. 959; 26 L. J. Q. B. 293; 110 R. R. 912, per Crompton, J.

(*l*) *Moore* v. *Booth*, (1797) 3 Ves. 350, 351; *List's Case*, (1814) 2 V. & B. 374; *Ex parte Temple*, (1814) *id.* 395; *Randall* v. *Gurney*, (1819) 3 B. & Ald. 252; *Webb* v. *Taylor*, (1843) 1 Dowl. & L. 676; 13 L. J. Q. B. 24; 67 R. R. 858; *Rishton* v. *Nisbett*, (1834) 1 M. & Rob. 347; *Spence* v. *Stewart*, (1802) 3 East, 89; 6 R. R. 549; *Sanford* v. *Chase*, (1824) 3 Cowen, 381.

applies to a party attending at judge's chambers (*m*), or before a Master or an examiner of the High Court (*n*), or at the Registrar's office on passing the minutes of a decree (*o*), or before the under-sheriff on the execution of a writ of inquiry (*p*); as also to witnesses attending the Central Criminal Court (*q*), the Court of Bankruptcy (*r*), courts-martial, whether military (*s*), marine (*t*), or naval (*u*), the Houses of Parliament, or committees of either House (*v*). It will also protect a prosecutor attending Quarter Sessions (*x*) or Assizes (*y*), even after the bill in which he is interested has been ignored, provided this fact has not been publicly announced (*z*). But a meeting of the London County Council for granting music and dancing licences would not confer the privilege, as such council is not a judicial tribunal (*a*).

§ 1335. A witness, too, who attends before a magistrate or other inferior judicial officer by virtue of a summons or a writ of subpœna, will, it seems, be privileged from arrest on civil process, *eundo, morando, et redeundo* (*b*); and the same privilege has been extended to a person attending before a police magistrate as a witness on a charge of felony after a remand, though he was not under recognisance or summons to appear (*c*). But the rule will not protect a common informer, or any person who voluntarily goes before a justice to obtain a summons against another party for penalties, even though the summons be obtained (*d*), or a barrister attending at Petty Sessions for the purpose of obtaining practice without a previous retainer,

(*m*) *Moore* v. *Booth*, (1797) 3 Ves. 350, 351; *In re Jewitt*, (1864) 33 L. J Ch. 730; 33 Beav. 559; 140 R. R. 262.

(*n*) *Id.*; *Wheeler* v. *Cox*, (1841) 3 Ir. L. R. 302, n.; *Brown* v. *M'Dermott*, (1840) 2 Ir. Eq. R. 438.

(*o*) *Newton* v. *Askew*, (1848) 6 Hare, 319; 18 L. J. Ch. 42; 77 R. R. 123.

(*p*) *Walters* v. *Rees*, (1819) 4 Moore, 34.

(*q*) *Newton* v. *Constable*, (1841) 2 Q. B. 162; 10 L. J. Q. B. 349.

(*r*) *Arding* v. *Flower*, (1800) 8 T. R. 534; *Ex parte King*, (1802) 7 Ves. 312; *Ex parte Clarke*, (1832) 2 Dea. & C. 99; *Ex parte Burt*, (1842) 2 Mont. D. & D. 666; *Willingham* v. *Matthews*, (1815) 6 Taunt. 356; *Andrews* v. *Martin*, (1862) 12 C. B. (N.S.) 371; 133 R. R. 371.

(*s*) 44 & 45 V. c. 58, s. 125, sub-s. 2.

(*t*) 44 & 45 V. c. 58, s. 179.

(*u*) 29 & 30 V. c. 109, s. 66.

(*v*) *Goffin* v. *Donelly*, (1881) 6 Q. B. D. 307; 50 L. J. Q. B. 303; May, L. of Parl., and the journals there cited.

(*x*) See *R.* v. *Skinner*, (1772) Lofft. 55; *Munster* v. *Lamb*, (1883) 11 Q. B. D. 558; 52 L. J. Q. B. 726.

(*y*) *Graves* v. *M'Carthy*, *supra*.

(*z*) *In re M'Kone*, (1841) Ir. Cir. Rep. 65.

(*a*) *Royal Aquarium* v. *Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409.

(*b*) See *Webb* v. *Taylor*, *supra*; *Mountague* v. *Harrison*, (1857) 27 L. J. C. P. 24; 3 C. B. (N.S.) 292; 111 R. R. 658; *Ex parte Edme*, (1822) 9 Serg. & R. 147.

(*c*) *Mountague* v. *Harrison*, *supra*.

(*d*) *Ex parte Cobbett*, (1857) 26 L. J. Q. B. 293; 7 E. & B. 955; 110 R R. 912.

although actually employed professionally at such Petty Sessions (*e*). Some doubt has been expressed as to whether the privilege could be extended further than to protect the bar while attending the superior courts, or perhaps such counsel as were actually engaged in professional business before the inferior tribunals (*f*).

§ 1336. Although a party discharged from illegal civil process is privileged from arrest during his return home (*g*), the discharge from criminal process, even in consequence of an acquittal, confers no such protection, unless it should appear that the apprehension on the criminal charge was a mere contrivance to get the party into custody in the civil suit (*h*). A distinction, however, has been drawn in Ireland, between the case of a prisoner actually in custody, and a party out on bail; and it has there been held, that a person who attends under a recognisance to answer a criminal charge, and is acquitted and discharged, is privileged from arrest while returning home (*i*). The validity of this distinction would probably be questioned in the English courts, since an accused, who surrenders to take his trial, is, during that trial, as much in legal custody as a prisoner who is brought up by the gaoler himself.

§ 1337. If a person entitled to privilege is unlawfully arrested, application for his discharge should be made either to the court where the cause is depending, in respect of which the privilege is claimed, or to the court out of which the process issued, upon which the arrest takes place; for this last court ought not to suffer its process to be executed, in violation of the privileges of other tribunals (*k*). Though the one court should, on motion, refuse to interfere, the person arrested may seek relief from the other (*l*); and it would even seem

(*e*) *Newton* v. *Constable*, *supra*.

(*f*) See observations of Lord Denman, C.J., in giving judgment of the Court in *Newton* v. *Constable*, which were made notwithstanding *Luntly* v. ——, (1833) 1 Cr. & M. 579.

(*g*) *In re Douglas*, (1842) 3 Q. B. 837; *R.* v. *Blake*, (1832) 4 B. & Ad. 355; 2 L. J. K. B. 29.

(*h*) *Goodwin* v. *Lordon*, (1835) 1 A. & E. 378; 40 R. R. 307; *Hare* v. *Hyde*, (1851) 16 Q. B. 394; 20 L. J. Q. B. 185; 83 R. R. 511; *Anon.*, (1832) 1 Dowl. 157; *Buckmaster* v. *Cox*, (1839) 2 Ir. L. R. 101; *Jacobs* v. *Jacobs*, (1834) 3 Dowl. 677; *In re Douglas*, (1842) 3 Q. B. 838.

(*i*) *Callans* v. *Sherry*, (1832) Alc. & Nap. 125; *Kelly* v. *Barnewall*, (1834) Cooke & Alc. 94; *Williams* v. *Steele*, (1835) 4 Law Rec., 1st Ser. 169; *Babington* v. *Mahony*, (1837) 5 Law Rec., 2nd Ser. 232, n.

(*k*) *Att.-Gen.* v. *Skinners' Co.*, (1837) 1 Coop. 1; *Kimpton* v. *London and North Western Ry.*, (1854) 9 Ex. 766; 23 L. J. Ex. 232; 96 R. R. 967; *Randall* v. *Gurney*, (1819) 3 B. & Ald. 252; *Ex parte Clarke*, (1832) 2 Deac. & C. 99; *Ex parte Burt*, (1842) 2 Mont. D. & D. 666; *Walker* v. *Webb*, (1797) 3 Anstr. 941; *Selby* v. *Hills*, (1832) 8 Bing. 166; 1 L. J. (O.S.) C. P. 55; 34 R. R. 667; *Bours* v. *Tuckerman*, (1811) 7 Johns. 538.

(*l*) *Randall* v. *Gurney*, (1819) 3 B. & Ald. 255.

that, without applying to either of these courts, the arrested party may obtain his discharge by causing himself to be brought by *habeas corpus* before any one of the superior judges at chambers (*m*). This last appears to be the proper course to pursue, whenever the witness has been actually lodged in gaol before the trial, and is made to appear in court by virtue of a writ of *habeas corpus ad testificandum* (*n*).

§ 1338. The Houses of Parliament will, of their own authority, respectively discharge all persons unduly arrested, while attending before such Houses, or before committees of either House (*o*); but witnesses summoned to give evidence before military, marine, or naval courts-martial must, in the event of their arrest, apply by affidavit for their discharge either to the court out of which the process issued, or if such court be not sitting, to some judge of the King's Bench Division in England or Ireland, or to the Court of Session in Scotland (*p*).

§ 1339. It does not appear to be yet clearly determined, within what time the motion for discharge must be made, or how far the witness arrested may waive his protection. In America, where the protection is regarded as a personal privilege, the party arrested may waive it; and if he willingly submits to be taken into custody, he cannot afterwards object to the imprisonment as unlawful (*q*). In Ireland the privilege is considered as bestowed for the good of the public; but there also it has been held, that the application for discharge must be made without delay (*r*). In this country the courts hold, as in Ireland, that the privilege is not the privilege of the person attending the court, but of the court which he attends, it being established for the benefit of the suitors and the advancement of justice (*s*); and they, consequently, appear to have considered that a prisoner cannot, by *laches*, preclude himself from taking advantage of the

(*m*) *Ex parte Tillotson*, (1816) 1 Stark. 470; *Towers* v. *Newton*, (1841) 1 Q. B. 319; 10 L. J. Q. B. 106, per Rolfe, B., after consulting Parke, B. See *Newton* v. *Constable*, (1841) 2 Q. B. 163, n. *b*; 10 L. J. Q. B. 349.

(*n*) The judge at *Nisi Prius* will in such case decline to interfere, as he has no means of ascertaining whether any other grounds of detention exist (*Astbury* v. *Belbin*, (1850) 3 Car. & K. 20). Inferior tribunals,—such as the Quarter Sessions (*Clerk* v. *Molineux*, (1664) T. Raym. 100), Arbitrators (*Walters* v. *Rees*, (1819) 4 Moore C. P. 34), or the Sheriffs Courts (*Id.*; *Wilson* v. *Sheriffs of London*, (1620) Brownl. 15), have no power to discharge arrested persons, unless they be arrested in the very face of the court (*id.*), and therefore, if a witness be taken into custody while attending these tribunals, he must have recourse to the superior court out of which the process issued.

(*o*) May, L. of Parl., but the party arrested may apply, if he think fit, to the court out of which the process issued; *Att.-G.* v. *Skinners' Co.*, (1837) 1 Coop. 1.

(*p*) See 44 & 45 V. c. 58, s. 125; 29 & 30 V. c. 109, s. 66.

(*q*) *Brown* v. *Getchell*, (1814) 11 Mass. 11, 14; *Geyer* v. *Irwin*, (1790) 4 Dall. 107.

(*r*) *In re* ——, (1841) 3 Ir. L. R. 301.

(*s*) *Anon.*, (1832) 1 Dowl. 158; *Magnay* v. *Burt*, (1843) 5 Q. B. 393; 64 R. R. 517; *Cameron* v. *Lightfoot*, (1777) 2 W. Bl. 1193.

illegality of his arrest; and that it is immaterial what interval may have been allowed to elapse between the arrest and the application for discharge, unless, perhaps, in a case where the interests of another party have been prejudiced by the delay (*t*). The allowance, however, or the disallowance of the privilege, is always discretionary; it is sometimes, therefore, clogged with conditions (*u*); and it has been disallowed in collusive, as well as vexatious, actions (*v*).

§ 1340. It is now finally decided that no action is maintainable against the sheriff or his officer for arresting a person while attending court as a witness; and this, too, though it be alleged and proved that the arrest was made maliciously, and with ample knowledge of the circumstances (*x*). It is also equally clear that an action of trespass will not lie against the plaintiff or his solicitor, who in such a case has intrusted the sheriff with the writ (*y*); neither will they be liable to an action on the case if they have enforced the execution of the process without full knowledge of the privilege of the witness (*z*). Whether the fact of knowledge and the proof of actual malice will make any difference in the position of the parties, may admit of much doubt; for, although it has been held at Nisi Prius, that under these circumstances an action on the case is maintainable (*a*), this ruling is scarcely reconcilable with the doctrines since laid down by the Exchequer Chamber in *Magnay* v. *Burt* (*b*). If a witness, who has been improperly arrested, obtains an order from the court for his discharge, and the sheriff afterwards disobeys this order, an action of trespass may, as it seems, be brought against the officer; for the further detention of the witness, without the authority of any writ to justify it, would become a new trespass and false imprisonment, in the same manner as if there had been a new caption (*c*).

§ 1341. Although the witness arrested has no remedy by action,

(*t*) *Webb* v. *Taylor*, (1843) 1 Dowl. & L. 684—687; 13 L. J. Q. B. 24; 67 R. R. 858. In that case 23 days had elapsed. *Andrews* v. *Martin*, (1862) 12 C. B. (N.S.) 372; 133 R. R. 371, per Willes, J. There the application was delayed for six months. See *Greenshield* v. *Pritchard*, (1841) 8 M. & W. 148; 10 L. J. Ex. 295, where after the lapse of a year, the court refused to interfere, though the party had been arrested under void process.

(*u*) *Andrews* v. *Martin*, *supra*.

(*v*) *Magnay* v. *Burt*, *supra*; *Cameron* v. *Lightfoot*, *supra*; *Anon.*, (1670) 11 Mod. 79.

(*x*) *Magnay* v. *Burt*, *supra*; *Cameron* v. *Lightfoot*, *supra*; *Tarlton* v. *Fisher*, (1781) 2 Doug. 671.

(*y*) *Yearsley* v. *Heane*, (1845) 14 M. & W. 322; *Ewart* v. *Jones*, (1845) *id.* 774; 15 L. J. Ex. 18.

(*z*) *Stokes* v. *White*, (1834) 1 Cr. M. & R. 223; 3 L. J. Ex. 321.

(*a*) *Whalley* v. *Pepper*, (1836) 7 C. & P. 506, per Littledale, J. See *Ewart* v *Jones*, (1845) 14 M. & W. 786; 15 L. J. Ex. 18, per Pollock, B. : *sed qu.*

(*b*) (1843) 5 Q. B. 381. See, also, *Vandevelde* v. *Lluellin*, (1661) 1 Keb. 220.

(*c*) 5 Q. B. 395, per Tindal, C.J.

the party arresting him maliciously, and with a knowledge of the existence of his privilege, will not be free from punishment; for he may still have an attachment awarded against him for contempt of court (*d*). On the same principle, the preventing, or using any means to prevent, a witness duly summoned from attending court, is punishable as a contempt (*e*), and so is offering him money with a view to influence his evidence (*f*), and so also is the use of threatening language to any person cognisant of facts in issue in a suit, with the view of preventing him from giving testimony at the hearing (*g*). Again, any public and calumnious attack on persons who are expected to be witnesses in a pending trial, is a contempt of the highest order as tending to pollute the source of justice (*h*); and any endeavour to intimidate a witness from giving evidence for the Crown in a prosecution is indictable as a misdemeanour (*i*). It will also perhaps be deemed a contempt to serve a writ of summons upon a witness in the immediate or constructive presence of the court (*k*); though a writ so served cannot be set aside for irregularity (*l*).

(*d*) *Cameron* v. *Lightfoot*, (1777) 2 W. Bl. 1193, 1194; *Vandevelde* v. *Lluellin*, (1661) 1 Keb. 220; *Magnay* v. *Burt*, (1843) 5 Q. B. 394.

(*e*) *Com.* v. *Feely*, 2 Virg. Cas. 1 (Am.).

(*f*) *In re Hooley*, (1898) 79 L. T. 306.

(*g*) *Shaw* v. *Shaw*, (1862) 31 L. J. P. & M. 35; 2 Sw. & Tr. 517.

(*h*) *R.* v. *Onslow & Whalley*, (1873) 12 Cox, 358.

(*i*) *R.* v. *Loughran*, (1839) 1 Craw. & D. 79.

(*k*) *Cole* v. *Hawkins*, (1738) Andr. 275; commented on in *Poole* v. *Gould*, (1856) 25 L. J. Ex. 250; 1 H. & N. 100; 108 R. R. 472. See, also, *Blight* v. *Fisher*, (1809) 1 Pet. C. C. R. 41; *Miles* v. *M'Cullough*, (1803) 1 Binn. 77.

(*l*) *Poole* v. *Gould*, *supra*.

CHAPTER II.

COMPETENCY OF WITNESSES (*a*).

§ 1342 (*b*). ALTHOUGH, in the ordinary affairs of life, temptations to practise deceit may be comparatively few, and therefore men may in general be disposed to rely upon the statements of each other; yet, in judicial investigations, the motives to pervert the truth are so greatly multiplied, that if statements were believed in courts of justice with the same indiscriminating credulity as in private life, much wrong would unquestionably be done. The danger of injustice arising from this cause, which doubtless should induce both judges and juries to watch with cautious suspicion the evidence laid before them, especially when it comes from an interested or polluted source, has, till modern times, been thought to justify the observance of rules, by virtue of which large and numerous classes of persons were rendered incompetent witnesses, and their testimony was uniformly excluded.

§ 1343. If these rules of exclusion had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of parties to the record and other interested witnesses, the law acted on the presumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more baseless calumny upon the veracity of witnesses and the intelligence of juries cannot well be imagined. So also the disqualification of a witness, which followed his conviction of an infamous crime, rested on the equally fallacious assumption that having been once guilty of a dereliction of duty, he would ever after be regardless of truth, even though he should have no private interest to serve. It is true that in the present century the palpable injustice which a strict adherence to these rules was found to cause, and the consequent growing disposition of the judges to narrow, as far as possible, their effect, and to convert

(*a*) The question of competency, though involving facts, is one to be determined by the court alone. See *ante*, § 23.

(*b*) Gr. Ev. § 326, in great part, as to first seven lines.

questions of competency into questions of credibility, occasioned the introduction of many exceptions; still the rules, subject to these exceptions, continued to prevail in our courts of justice, and the very exceptions, which were intended to limit their operation, became in their turn productive of frequent injustice. The difficulty of deciding whether any particular witness fell within the rule or the exception was so great, and the consequences of an erroneous decision were so costly and harassing, that little practical benefit resulted from the change. If, relying on the opinion of the judge that a certain important witness was competent to testify, a party determined upon calling him, and was thus enabled, in the first instance, to establish a just or to resist an unjust, claim, it frequently happened that the court above differed in opinion with the judge who presided at the trial; the consequence of which was that the verdict was set aside without any regard to the real merits of the case, and the party who had obtained it was driven, at a large expense, and to his infinite annoyance, to seek for a second verdict, perhaps equally inconclusive.

§ 1344. Jeremy Bentham, in the reign of Geo. IV., in vain undertook to expose the abuses of this system, and ventured to assert that, if the discovery of truth were the end of the rules of evidence, and sagacity consisted in the adaptation of means to ends, the sagacity displayed by the sages of the law in defining these rules was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as in the line of physical science the sagacity shown by the peasant was to that evinced by a Newton (*c*). Lawyers wedded to a system, which they arrogantly deemed the perfection of reason, listened with impatience to arguments, which, if adopted, would compel them to unlearn the lessons of their youth; while the uninitiated, for the most part, regarded the controversy with indifference, as though, forsooth, it related to a subject in which they had no interest, or else refrained from expressing, if not from forming, an opinion upon matters, respecting which they felt themselves incompetent to decide. The fact is, that, when Mr. Bentham's work on Evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox and wrote bad English, while in the judgment of even the discerning few, this great apostle of judicial reform ranked a little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus, by little and little, Mr. Bentham's opinions were at first canvassed, then recognised as correct (*d*), and finally, in a great measure, adopted by the Legislature.

(*c*) 1 Benth. Ev. 6.

(*d*) See 1 Ph. Ev. 42—44, where the arguments for and against the rule which excluded witnesses on account of interest are very fairly stated.

§ 1345. The first blow aimed at the old law of incompetency was dealt in the year 1833 by the Act of 3 & 4 W. 4, c. 42, which by sections 26 and 27 (*e*) enacted, in substance, that no witness should thenceforth be incompetent to testify in any action, simply because the judgment would be evidence for or against himself; but that, in the event of his being examined, the judgment should not be thus used, and his name should be indorsed on the record so as to furnish proof of his having given evidence.

§ 1346. These sections were, in 1840, re-enacted in an Irish statute (*f*); and by furnishing a simple method for restoring the competency of witnesses, who were only so far interested in the event of the action, that the record might in a subsequent suit be evidence for or against themselves, they effected a material amendment in the then existing law, and were hailed by the converts to Mr. Bentham's philosophy, as the harbingers of a far more extensive change. It was not, however, till the session of 1843 that the hopes of these advocates of reform were destined to be realised, when a bill, brought into the House of Lords by Lord Denman, was after considerable discussion passed into an Act (*g*).

§ 1347. This Act—after stating in the preamble that "whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony"—enacts, that "no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury (*h*), or of the suit, action, or pro-

(*e*) These sections were repealed by 37 & 38 V. c. 35.

(*f*) 3 & 4 V. c. 105, ss. 51, 52; now repealed by 16 & 17 V. c. 113, s. 3, and Sch. A.; and again by 38 & 39 V. c. 66.

(*g*) 6 & 7 V. c. 85, passed 22 Aug., 1843.

(*h*) *Sic* in the printed statute. Qu. "*inquiry*."

ceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime (*i*) *or offence* (*k*). [A proviso here followed in the original Act, which, as to parties themselves, is repealed by 14 & 15 V. c. 99, s. 1; and as to their husbands and wives by 16 & 17 V. c. 83, s. 4; and also by 37 & 38 V. c. 96.]: Provided also that this Act shall not repeal any provision in the Wills Act, 1837 (*l*). Provided that in Courts of Equity any defendant to any cause pending in any such court, may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant, so to be examined, may have in the matters, or in any of the matters in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting, or tending to affect, the credit of such defendant as a witness."

§ 1348. It will be seen that, by the provisoes here introduced, some few exceptions were engrafted on the general rule, that no interested witness should be incompetent to give evidence; and so far the triumph of Bentham's proposition, that "in the character of objections to competency no objections ought to be allowed" (*m*), failed to be complete. In 1846, the Legislature—while establishing the County Courts by the Act of 9 & 10 V. c. 95—enacted, that "on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation" (*n*). After the wisdom of this great alteration in the law had been tested and thoroughly proved by the experience of five years, a final effort was made by Lord Brougham to

(*i*) Lush, J., is reported to have ruled, that, notwithstanding these words, a person under sentence of death is incapable of being a witness, *R.* v. *Webb*, (1867) 11 Cox, C. C. 133. *Sed qu.* In *R.* v. *Fitzgerald*, (1884) unreported, the evidence of a convict was admitted, and *R.* v. *Webb* not followed.

(*k*) Independently of this Act, witnesses are competent, though not compellable, to testify to their own turpitude; as, for instance, to admit that their former oaths were corruptly false, *R.* v. *Teal*, (1809) 11 East, 309; 10 R. R. 516; *Rands* v. *Thomas*, (1816) 5 M. & S. 244; or to prove that notes, to which they have given credit and currency by their signatures, have been fraudulently concocted by them. *Jordaine* v. *Lashbrooke*, (1798) 7 T. R. 601, overruling *Walton* v. *Shelley*, (1786) 1 T. R. 296. In fact, the maxim of the civil law, "*nemo allegans suam turpitudinem est audiendus*," is not recognised in English courts of justice: and the decisions of Jefferies, C. J., and Legge, B., who are both reported to have rejected witnesses, when called to prove that they had perjured themselves on some former occasion, are no longer of any authority. See *Titus Oates' Case*, (1685) 10 How. St. Tr. 1185, 1186; and *Eliz. Canning's Case*, (1754) 19 How. St. Tr. 632.

(*l*) 7 W. 4 & 1 V. c. 26.

(*m*) 1 Benth. Ev. 3.

(*n*) S. 83; now repealed. See also 6 & 7 W. 4, c. 75, s. 36, and 14 & 15 V. c. 57, s. 102, which enabled parties to appeal to the oaths of their opponents in the Irish Civil Bill Courts.

induce Parliament to carry out the principle to its legitimate extent. This effort was crowned with almost entire success; and the statute 14 & 15 V. c. 99, having received the royal assent in August, 1851, came into operation in the following September (*o*).

§ 1349. The sections of this Act, which relate to the competency of witnesses, are as follows:—

"II. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, *except* as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

"III. But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself (*p*), or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

§ 1350. The Common Law Commissioners expressed an opinion most favourable to the merits of the measure, observing in their second Report (*q*), that "according to the concurrent testimony of the bench, the profession, and the public, the new law is found to work admirably,

(*o*) This statute was prepared by the author of the present work, and in the eighth and earlier editions of this work a characteristic letter of acknowledgment and thanks to him from Lord Brougham was set out at length.

(*p*) The proviso contained in this last line and a-half was most injudiciously introduced into the Act by the House of Lords at the pressing instance of Ld. Truro. As Ld. Campbell pointed out at the time, it is merely calculated to raise doubts where none should exist. By the general law of the land, every witness is protected from answering questions, where the answer would tend either to criminate himself, or to expose him to any penalty, forfeiture, or ecclesiastical censure; and as the Act simply makes parties witnesses, it is obvious that, without any special enactment, they might have claimed the same protection as all other persons under examination. But how stands the matter now? The Act states that they cannot be forced to criminate themselves. Good; but can they be compelled to disclose what will render them liable to penalties, forfeitures, or spiritual reprimands? Is the maxim "*expressum facit cessare tacitum*," to apply, or can the party give the go-by to the statute, and rest on the common law?

(*q*) P. 11.

and to contribute in an eminent degree to the administration of justice"; and these sentiments have been confirmed by a Parliamentary avowal, in which it is declared that "the discovery of truth in courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses" (*r*).

§ 1351. On one point the Act of 1851 was essentially defective; for although it rendered husbands and wives admissible witnesses for or against each other, when both were jointly parties as plaintiffs or defendants (*s*), it did not further interfere with the common-law rule, which—except in the County Courts (*t*) and the Court of Bankruptcy (*u*)—precluded either the husband or the wife from giving testimony in a cause in which the other was a party (*v*). The Evidence Amendment Act of 1853 (*x*) was accordingly passed, the first three sections of which are as follows:—

"I. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

"II. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding [or in any proceeding instituted in consequence of adultery]" (*y*).

"III. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

§ 1353. Both the Evidence Act, 1851, and the Evidence Amend-

(*r*) 32 & 33 V. c. 68, preamble.

(*s*) *Stokehill and Wife* v. *Pettingell*, (1852) 21 L. J. Q. B. 248, n.

(*t*) 9 & 10 V. c. 95, s. 83, cited *ante*, § 1348.

(*u*) See the Repealed Act, 12 & 13 V. c. 106, s. 118.

(*v*) *Stapleton* v. *Crofts*, (1852) 18 Q. B. 367; 21 L. J. Q. B. 246; *Barbat* v. *Allen*, (1852) 7 Ex. 609; 21 L. J. Ex. 156.

(*x*) 16 & 17 V. c. 83.

(*y*) The words within brackets were repealed by 32 & 33 V. c. 68, s. 1. See *post*, § 1355.

ment Act, 1853, however, still left the parties to actions for breach of promise to marry incompetent to give evidence. In 1869, however, Mr. Denman (afterwards Mr. Justice Denman) carried through Parliament the Evidence Further Amendment Act, 1869 (*z*), which, after specially enacting that "the parties to any action for breach of promise of marriage shall be competent (*a*) to give evidence in such action"—goes on to provide, that no plaintiff in any such action "shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise" (*b*).

§ 1354. When the Evidence Acts of 1851 and 1853 were respectively before Parliament, it was not surprising that the Legislature determined to exclude from their operation the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties. Obvious reasons would occur to any man, why defendants in these suits should not be exposed to the almost irresistible temptation of committing perjury (*c*); and their exclusion from the witness-box seemed at that time to afford the only safe mode of avoiding such a result. In the year 1857, however, when the law of divorce was amended, doubts were caused by the obscure language of the amending statute (*d*), as to how far the old doctrines of the common law in relation to the competency of witnesses were to be recognised in the Divorce Court.

§ 1355. The Evidence Further Amendment Act, 1869 (*e*), after repealing the fourth section of the Act of 1851, and so much of the

(*z*) 32 & 33 V. c. 68.

(*a*) By Ld. Brougham's Act, they are also "compellable" to give evidence, see *ante*, § 1349. See L. Q. R. vol. 24, p. 214.

(*b*) 32 & 33 V. c. 68, s. 2. See *Hickey* v. *Campion*, (1872) I. R. 6 C. L. 557; *Bessela* v. *Stern*, (1877) 2 C. P. D. 265; 46 L. J. C. P. 467; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762.

(*c*) See on this subject the powerful observations of Ld. Denman (then Mr. Denman), in Queen Caroline's trial:—"We have been told," said he, "that Bergami might be produced as a witness in our exculpation, but we know this to be a fiction of lawyers, which common sense and natural feeling would reject. The very call is one of the unparalleled circumstances of this extraordinary case. From the beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. . . . How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuists might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths.' Quoted in 1 Ld. Brougham's Speech. 248.

(*d*) See and compare 20 & 21 V. c. 85, ss. 41, 43, 46.

(*e*) 32 & 33 V. c. 68.

second section of the Act of 1853, "as is contained in the words 'or in any proceeding instituted in consequence of adultery,'" proceeds to enact, in section 3, as follows:—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties shall be competent (*f*) to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery" (*g*). The language used in this proviso, though not free from ambiguity, will not protect a party, who tenders himself as a witness for the purpose of disproving one act of adultery, from being cross-examined respecting other acts, provided that these last be duly charged in the pleadings (*h*). Neither does the statute render inadmissible the evidence of a witness that he or she has committed adultery, but it simply protects the witness from being questioned on the subject in the event of the protection being claimed (*i*). No one but the witness has any right to interfere (*k*). In any suit in the Divorce Court the petitioner is not compellable to answer questions tending to prove his adultery (*l*).

§ 1356. Notwithstanding these changes in the law relating to evidence in civil suits the old common-law rule of incompetency still prevailed in criminal cases, and, until the passing of the Criminal Evidence Act, 1898 (*m*), rendered two classes of persons altogether incompetent to testify, namely, first, those persons who, in any criminal proceeding, are charged with the commission of any indictable offence, or any offence punishable on summary conviction; secondly, the husbands and wives of persons, who are defendants in any criminal proceeding. On these general rules a few exceptions have been engrafted, which will be referred to hereafter.

§ 1357. The first class of persons whom the law in general regards

(*f*) By Ld. Brougham's Acts they are also "compellable" to give evidence, see *ante*, § 1349.

(*g*) A petition to vary a settlement under section 5 of the Matrimonial Causes Act, 1859 (22 & 23 V. c. 61), is not a proceeding instituted in consequence of adultery within the meaning of the Evidence Further Amendment Act: *Evans* v. *Evans*, [1904] P. 378; 73 L. J. P. 114.

(*h*) *Brown* v. *Brown and Paget*, (1874) L. R. 3 P. & D. 198; 43 L. J. P. & M. 33; *Allen* v. *Allen and Bell*, [1894] P. 248; 63 L. J. P. D. & A. 120; *Brown* v. *Brown*, [1915] P. 83; 84 L. J. P. 153 See also *Ruck* v. *Ruck*, [1911] P. 90; 80 L. J. P. 17.

(*i*) *Hebblethwaite* v. *Hebblethwaite*, (1869) L. R. 2 P. & D. 29; 39 L J. P. & M. 15; *Babbage* v. *Babbage*, (1870) L. R. 2 P. & D. 222.

(*k*) *Hebblethwaite* v. *Hebblethwaite*, *supra*.

(*l*) 20 & 21 V. c. 85, s. 43; *S.* v. *S.*, [1907] P. 224; 76 L. J. P. 118.

(*m*) 61 & 62 V. c. 36.

as partially incompetent to testify, includes defendants in our criminal courts and parties charged before magistrates with minor offences. It has been seen that Lord Brougham's Act of 1851, in making parties to the record admissible witnesses, has expressly provided, in section 3 (*n*), that nothing in the Act "shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself." Now this proviso calls for three observations. In the first place, it does not say that the persons specified in it shall not be rendered by the Act competent or compellable to give evidence at all, but merely that they shall not be allowed or forced to testify for or against themselves. In the event, therefore, of several persons being jointly indicted, it would seem to be no unreasonable proposition to contend that any one of them might, under section 2, be called as a witness either for or against his co-defendants, excepting only in those few cases where the indictment was so framed as to give him a direct interest in obtaining their discharge. Indeed, for some years this was considered to be the law by many judges (*o*), though some doubted (*p*); and at last, in 1872, on the point being reserved for the Court of Crown Cases Reserved, that court, after much discussion, decided that Lord Brougham's Act was not intended to alter, and did not in fact alter, the ancient law of England, which prohibited any attempt to examine or cross-examine any prisoner on his trial (*q*). Whenever, therefore, it becomes necessary to obtain the testimony of a defendant in a criminal trial as against his co-defendants, the proper course—unless he has pleaded guilty on his arraignment and is therefore not given in charge to the jury (*r*)—is either to enter a *nolle prosequi* (*s*), or to apply for a verdict of acquittal before opening the case (*t*); though the court, in its discretion, will direct an acquittal either during the progress or at the termination of the inquiry, if no evidence has been given inculpating the party who is sought to be made a witness (*u*). Nothing short of a formal judgment or a plea of guilty can, however, be considered, as, for this purpose, an end of the

(*n*) *Ante*, § 1349.

(*o*) See *R.* v. *Deeley*, (1870) 11 Cox C. C. 607, per Mellor, J.; *R.* v. *Stevenson & Coulter*, per Ball, J., at Armagh, on 4 March, 1851. The indictment in this last case was for an aggravated assault, and Coulter was examined as a witness for Stevenson. See also *Winsor* v. *R.*, (1866) L. R. 1 Q. B. 390; 35 L. J. M. C. 161.

(*p*) See *R.* v. *Jackson*, (1855) 6 Cox C. C. 525.

(*q*) *R.* v. *Payne*, (1872) L. R. 1 C. C. R. 349; 41 L. J. M. C. 65.

(*r*) *R.* v. *Gallagher*, (1875) 13 Cox C. C. 61.

(*s*) *R.* v. *Sherman*, (1736) Cas. t. Hard. 303; *R.* v. *Ellis*, (1802) 1 M'Nally, Ev. 55.

(*t*) *R.* v. *Rowland*, (1826) Ry. & M. 401.

(*u*) *R.* v. *Fraser*, (1797) 1 M'Nally, Ev. 56; *R.* v. *O'Donnell*, (1857) 7 Cox C. C. 337.

matter (*v*). For instance, in general, separate trials being ordered will not suffice (*x*). As soon, however, as an end has been legally and effectually put to the case against him, a prisoner becomes competent to testify, either for the Crown, or for his former co-defendants (*y*). Moreover, in very special circumstances (for instance, where the indictments might have been severed and a joint trial might improperly prejudice the case of one of the defendants), some or one of several persons indicted jointly for publishing blasphemous libels may be put separately on his (or their trial) and allowed to call the other defendants as witnesses, though they still remain liable to be tried for the same offence (*z*).

§ 1358. The second point which it is important to notice with respect to the proviso in question, is that it merely applies to persons who are charged in any *criminal* proceeding, either with *indictable* offences, or with offences punishable by *summary conviction* (*a*). Penal proceedings instituted in the Ecclesiastical Courts do not fall within either of these two categories; and, consequently, if the office of the judge be promoted against a clergyman for immoral conduct, the defendant will be competent to testify in his own behalf, and may even be subjected to examination on the part of the prosecution (*b*). It may be true that he cannot be compelled to answer any questions tending to expose him to conviction, though this is a point on which, as before observed (*c*), some doubt may possibly be entertained; but should he rely on his legal protection and decline to answer, the inference against him raised by such conduct must of necessity be strong (*d*). It is equally obvious that *qui tam* actions for penalties,—although to a certain extent they partake of a penal character,—are not included in the language of the proviso; and the defendants in such actions may therefore be examined on either side. The same remark applies to many charges preferred before justices,

(*v*) Gr. on Ev. (15th ed.), § 362.

(*x*) *People* v. *Bill*, (1813) 10 Johns. 95 (Am.).

(*y*) *R.* v. *O'Donnell*, *supra*.

(*z*) *R.* v. *Bradlaugh*, (1883) 15 Cox C. C. 217.

(*a*) These words apply to an information against a party under 1 & 2 W. 4, c. 32, s. 23, for using snares to take game, not having a game certificate : *Cattell* v. *Ireson*, (1858) 27 L. J. M. C. 167; E. B. & E. 91; 113 R. R. 559. Also to a summons before Petty Sessions, to enforce a penalty for keeping a dog without a licence, contrary to the Dogs' Regulation, Ireland, Act, 1865; *R.* v. *Sullivan*, (1874) I. R. 8 C. L. 404. Also to a summons to find sureties for good behaviour; *R.* v. *Queen's County JJ.*, *Re Feehan*, (1882) 10 L. R. Ir. 294.

(*b*) *Bp. of Norwich* v. *Pearse*, (1868) 37 L. J. Ecc. C. 90; L. R. 2; A. & E. 281, per Sir R. Phillimore, overruling *Burder* v. *O'Neill*, (1863) 9 Jur. N. S. 1109, per Dr. Lushington. See also *Berney* v. *Bp. of Norwich*, (1867) 36 L. J. Ecc. 10.

(*c*) See *ante*, § 1349.

(*d*) *Att.-Gen.* v. *Radloff*, (1854) 10 Ex. 98; 23 L. J. Ex. 240; 102 R. R. 490, per Martin, B.

which, although in one sense they may be regarded as criminal proceedings, do not result in summary convictions, such as applications for orders of affiliation (*e*).

§ 1359. As serious doubts have been entertained, whether an information filed by the Attorney-General for the recovery of penalties consequent on a breach of the revenue laws, was, or was not, such a "criminal proceeding" as to render the defendant an inadmissible witness (*f*), the Legislature has five times interposed with the view of clearing up the matter by positive enactment. On the fourth occasion an Act was passed (*g*), which would seem to have settled the point by enacting affirmatively, that the Evidence Acts of 1851 and 1853 shall extend to proceedings at law on the Revenue Side of the Queen's Bench Division, and by enacting negatively, that such proceedings "shall not be deemed criminal proceedings" within the meaning of the said Acts. However, this language was still deemed insufficient, and consequently, in 1876, a fifth statute declared, that where any proceedings are had under the Customs Acts in the High Court of Justice on the Revenue Side, "the defendant shall be competent and compellable to give evidence" (*h*).

§ 1360. Another observation suggested by the proviso in Lord Brougham's Act is, that it does not render the persons specified incompetent to testify either for or against themselves,—for the Act is in no respect a *disqualifying* statute,—but it simply leaves untouched the previous law on the subject. In whatever cases, therefore, previous to the passing of the Act, defendants charged with offences were rendered competent to give evidence, they may still, notwithstanding the proviso, be examined as witnesses. The principal statutes which authorised such an examination, will be found to relate to cases in which the defendant is either a nominal party on the record, or is only one of many persons against whom the proceeding is really instituted.

§ 1361. With regard to the second class of persons who until recently remained generally absolutely incompetent to testify in criminal proceedings, namely, the husbands and wives of defendants, the common-law rule has not been interfered with either by the Act of 1851, or by the Act of 1853. Both statutes contain an express proviso, that nothing therein shall "render any husband competent

(*e*) *R.* v. *Berry*, (1859) Bell, C. C. 46, 59; 28 L. J. M. C. 86; *R.* v. *Lightfoot*, (1856) 6 E. & B. 822; 25 L. J. M. C. 115; 106 R. R. 814.

(*f*) *Att.-Gen.* v. *Radloff*, *supra*. Pollock, C.B., and Parke, B., held that the defendant was not a competent witness; Platt and Martin, Bs., held that he was.

(*g*) 28 & 29 V. c. 104, s. 34.

(*h*) 39 & 40 V. c. 36, s. 259.

or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding" (*i*). The object of the proviso in the first-named Act has been much canvassed by the judges (*k*). As the bill originally stood, the clause was obviously necessary, because husbands and wives were made competent witnesses. The enactment, however, to that effect, after having been struck out in the Upper House and re-inserted by the Commons, met with so strenuous an opposition when the bill was returned to the Lords, that it was withdrawn at the last moment. The Act, therefore, finally passed in a form which left the law of husband and wife precisely where it found it,—excepting only in those few cases where both of them are either parties to the record, or persons in whose behalf the action is brought or defended. Whenever this state of things occurs, the wife, as a party, or an interested person, may, under the express terms of the second section, give evidence for or against her husband, and the husband, in like manner, may give evidence for or against his wife; and it was merely because a man and his wife are sometimes both of them parties to the same indictment or other criminal proceeding, that the clause prohibiting them, under such circumstances, from testifying for or against each other was retained in the Act, although the general enactment respecting husbands and wives was struck out. Were it not for this clause, a wife, conjointly indicted with her husband for murder, might be called by the prosecutor to establish the man's guilt, or the man might be examined by the counsel for the defence to prove the woman's innocence.

§ 1362. Returning now to the common-law rule itself, it will be found not only to exclude the husband or wife of a defendant in a criminal proceeding, who is called to give evidence of what occurred during their marriage, but to prevent such witness from being examined, either as to circumstances that happened before the marriage, or even as to the very fact of the marriage itself. Thus, if a man be prosecuted for bigamy, his first wife formerly could not be called to prove her marriage with the defendant (*l*). The rule also applied to all cases in which the interests of a married person, who is a defendant in a criminal proceeding, are involved, and therefore a wife could not be witness for a co-defendant, as her testimony might tend,

(*i*) 14 & 15 V. c. 99, s. 3; 16 & 17 V. c. 83, s. 2.

(*k*) See *Barbat* v. *Allen*, (1852) 7 Ex. 615, 616; 21 L. J. Ex. 156; *Stapleton* v. *Crofts*, (1852) 18 Q. B. 367; 21 L. J. Q. B. 346; *Kenort* v. *Pittis*, (1853) 2 E. & B. 425; 23 L. J. Q. B. 33; 95 R. R. 620.

(*l*) *Grigg's Case*, (1672) T. Ray. 1. The Criminal Justice Administration Act (4 & 5 Geo. 5, c. 58), s. 28 (3), now provides that the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or the defence and without the consent of the person charged.

at least indirectly, to her husband's acquittal (*m*). Thus, where the wife of one prisoner was called to prove an alibi in favour of another jointly indicted with her husband for burglary, her testimony was rejected on the ground, that, by shaking the evidence of a witness for the prosecution who had identified both prisoners, it would materially weaken the case against the husband (*n*).

§ 1363. Moreover, as the courts recognised no distinction between admitting the evidence of married persons for or against each other (*o*), a husband has been deemed an inadmissible witness in support of a prosecution, which charged his wife and several other persons with conspiring to procure his marriage without the consent of his parents (*p*); and where four men were indicted for sheep-stealing, Mr. Baron Bolland rejected the testimony of the wife of one of them, who was called to prove facts against the other prisoners (*q*).

§ 1364. But though the rule of exclusion was thus stringent where a married person was criminally accused in conjunction with others, it is clear that where a married defendant had pleaded guilty (*r*), or was entirely removed from the record, whether by a verdict pronounced in his favour, or by a previous conviction, or by the jury not being charged with his interest at the time of the trial, his wife might testify either for or against any other persons who might be parties to the record (*s*); and the mere hope that, by giving evidence against a prisoner, a wife may procure the pardon of her husband who has been previously convicted of another crime, will by no means affect her competency, though it may, and indeed must, shake her credit (*t*). It seems scarcely necessary to add, that the wife of a prosecutor in a criminal proceeding would not be excluded by this rule from giving evidence either for the Crown or for the defendant (*u*).

§ 1365 (*v*). This rule of exclusion is extended only to lawful

(*m*) *R.* v. *Thompson and others*, (1872) L. R. 1 C. C. R. 377; 41 L. J. M. C. 112.

(*n*) *R.* v. *Smith*, (1826) 1 Moo. C. C. 289. See also *R.* v. *Hood*, (1830) *id.* 281; *R.* v. *Frederick*, (1738) 2 Str. 1095; *R.* v. *Glassie*, (1854) 7 Cox, 1.

(*o*) *R.* v. *Perry*, per Gibbs, C.J., cited and approved of by Abbott, C.J., in *R.* v. *Serjeant*, (1826) Ry. & M. 354.

(*p*) *R.* v. *Serjeant*, *supra*.

(*q*) *R.* v. *Webb*, (1830) referred to in Russ. C. & M.

(*r*) *R.* v. *Thompson & Simpson*, (1863) 3 F. & F. 824.

(*s*) *Hawkesworth* v. *Showler*, (1843) 12 M. & W. 49, 50; 13 L. J. Ex. 86, per Alderson, B.; *R.* v. *Williams*, (1838) 8 C. & P. 284, per *id.*, who stated that, in *Thurtell's Case*, Mrs. Probert was examined as the principal witness against Thurtell, after her husband was acquitted.

(*t*) *R.* v. *Rudd*, (1775) 1 Lea. 127.

(*u*) See *R.* v. *Houlton*, (1823) Jebb. C. C. 24.

(*v*) Gr. Ev. § 339, in part

marriages. Thus, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness either for or against the prisoner; for the second marriage is void (*x*). But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not have been admitted (*y*). Whether a man can call as a witness a woman with whom he has long cohabited, whom he has constantly represented to be his wife, and by whom he has had children, has been declared to be at least doubtful (*z*). Lord Kenyon rejected such a witness, when offered by the prisoner in a capital case tried before him at Chester (*a*); but in that case the criminal had, throughout the trial, admitted that the witness was his wife, and was thus in a manner estopped from denying the marriage when her competency was questioned; and in the subsequent case of *Batthews* v. *Galindo* (*b*), where Lord Kenyon's ruling was discussed, Park and Burrough, JJ., declared that his lordship's decision was founded on this admission, and the whole court determined that a kept mistress was a competent witness for her protector, though she passed by his name and appeared to the world as his wife. So, where the parties had lived together as man and wife, believing themselves lawfully married, but had separated on discovering that a prior husband, supposed to be dead, was still living, the woman was held to be a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation (*c*). It seems, also, from this last case, and from several others (*d*), that a supposed husband or wife may be examined on the *voire dire* to facts showing the invalidity of the marriage; and it is apprehended that no valid reason can be given for not admitting their evidence thus far, though the fact that the marriage ceremony has been actually performed may have been previously proved by independent testimony (*e*).

See now the Criminal Justice Administration Act, 1914, *ante*, § 1362.

§ 1366 (*f*). Whether the rule may be relaxed so as to admit the

(*x*) B. N. P. 287; *R.* v. *Serjeant*, (1826) Ry. & M. 354, per Abbott, C.J

(*y*) *Grigg's Case*, (1692) T. Ray. 1. But it seems that the wife, though inadmissible as a witness, may be produced in court for the purpose of being identified, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen. Alison, Pract. of Cr. L. 463.

(*z*) *Campbell* v. *Twenlow*, (1814) 1 Price, 88, 89.

(*a*) *Anon.*, (1782) cited by Richards, B., in 1 Price, 83.

(*b*) (1828) 4 Bing. 610, 612, 613; 6 L. J. (O.S.) C. P. 138.

(*c*) *Wells* v. *Fletcher*, (1831) 5 C. & P. 12.

(*d*) *R.* v. *Peat*, (1838) 2 Lewin C. C. 288; *R.* v. *Wakefield*, (1827) *id.* 279.

(*e*) *R.* v. *Bramley*, (1795) 6 T. R. 330; *R.* v. *Bathwick*, (1831) 2 B. & Ad. 646, where Ld. Tenterden observed that, "it might well be doubted, whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called."

(*f*) Gr. Ev. § 340, in great part.

wife to testify for or against the husband, where the parties consent to such a course, is a question on which the authorities are not agreed (*g*). Lord Hardwicke was of opinion that she was not admissible to give evidence against her husband even with his consent (*h*); and this opinion has been followed in America (*i*), apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, but that the public have also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. Still, Lord Chief Justice Best stated on one occasion (*k*), that he would receive the evidence of the wife if her husband consented; apparently regarding the interest of the husband as the sole ground of her exclusion, since he cited a case where Sir James Mansfield (*l*) had once permitted a plaintiff to be examined with his own consent. This question was afterwards again mooted in the Court of Exchequer, in a case in which the defendant had called his wife as a witness, but the judge at Nisi Prius had rejected her testimony on objection taken (*m*). The plaintiff had afterwards offered to waive the objection, but the judge had refused to receive the waiver. Under these circumstances the learned Barons,—without deciding the question whether the witness could be thus examined by consent,—were contented to hold that it was at least discretionary with the judge, whether he would allow the objection to be withdrawn, and he having refused to do so, they declined to interfere (*n*).

§ 1367 (*o*). Although, in the instances before mentioned, the common-law rule of incompetency renders the husband and wife inadmissible as witnesses for or against each other, in all other cases they may be called, notwithstanding the evidence of the one may tend to subject the other to a criminal charge (*p*). Thus, in a question respecting a female pauper's settlement, where a man testified

(*g*) Under § 1710, cl. 1, of the New York Civ. Code, "A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined, as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding, for a crime committed by one against the other."

(*h*) *Barker* v. *Dixie*, (1736) Ca. t. Hard. 264.

(*i*) *Randall's Case*, (1820) 5 City Hall Rec. 141, 153, 154; *Colbern's Case*, (1823) 1 Wheel. C. C. 479.

(*k*) *Pedley* v. *Wellesley*, (1829) 3 C. & P. 558.

(*l*) In the report, the decision is said to have been one of Ld. Mansfield's, but this is probably a mistake, as the case referred to would seem to be that of *Norden* v. *Williamson*, (1808) 1 Taunt. 377.

(*m*) This was before the passing of the Act 16 & 17 V. c. 83. See *ante*, § 1352.

(*n*) *Barbat* v. *Allen*, (1852) 7 Ex. 609; 21 L. J. Ex. 156.

(*o*) Gr. Ev. § 342, in part.

(*p*) See *R.* v. *Halliday*, (1860) 29 L. J. M. C. 148; 8 Cox C. C. 298.

that he was married to the pauper, another woman was admitted to prove her own previous marriage with the same man; for although, if the testimony of both witnesses was true, the husband was chargeable with the crime of bigamy, neither the evidence nor the record in that case would be receivable against him upon such a charge, the point at issue being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision (*q*). So, in an action by the indorsee against the acceptor of a bill of exchange, the wife of the drawer would probably be permitted to prove that her husband had forged the bill (*r*); though,—subsequently to the decision of *R.* v. *Bathwick*,—two learned judges are reported to have held, that, on an indictment for theft, a woman could not be called on the part of the Crown, to prove that her husband, who had absconded, was present when the property was taken, and that she saw him deliver it to the prisoner (*s*).

§ 1368. But although, in these cases, the wife will be permitted to testify against her husband, it by no means follows that she can be compelled to do so; and the better opinion is that she may throw herself upon the protection of the court, and decline to answer any question, which would tend to expose her husband to a criminal charge (*t*).

§ 1369. In all actions, suits, and other proceedings between third parties, husbands and wives will be permitted to contradict, and even to discredit, each other as freely as if the marriage was void (*u*). If this were not the law, great injustice might be done; since the competency of the witness would then depend upon the marshalling of the evidence, and the testimony of a husband might be rendered inadmissible for the defendant, from the accidental circumstance of his wife having been previously called on the part of the plaintiff, though had the defendant been entitled to begin, the husband would have been examined, and the wife rejected. In Ireland, all the judges have held, that the evidence of a wife could not be rejected on the

(*q*) *R.* v. *Bathwick*, (1831) 2 B. & Ad. 639, 647; 9 L. J. (O.S.) M. C. 103; 36 R. R. 690; *R.* v. *All Saints, Worcester*, (1817) 6 M. & S. 194. These cases overrule *R.* v. *Cliviger*, (1788) 2 T. R. 263, where it was broadly held that a wife was in every case incompetent to give evidence, tending to criminate her husband.

(*r*) *Henman* v. *Dickinson*, (1828) 5 Bing. 183; 7 L. J. (O.S.) C. P. 68; 30 R. R. 565. In this case the point was not expressly decided.

(*s*) *R.* v. *Gleed*, (1823) 3 Russ. C. & M. 623, per Taunton and Littledale, JJ. *Sed qu.*

(*t*) *R.* v. *All Saints, Worcester*, *supra*; *Cartwright* v. *Green*, (1803) 8 Ves. 405; 7 R. R. 99; *post*, § 1453.

(*u*) *Stapleton* v. *Crofts*, (1852) 18 Q. B. 368; 21 L. J. Q. B. 246, per Ld. Campbell; 373, per Erle, J.; *R.* v. *Bathwick*, (1831) 2 B. & Ad. 646, per Ld. Tenterden; *R.* v. *All Saints, Worcester*, *supra*; *Annesley* v. *Ld. Anglesea*, (1743) 17 How St. Tr. 1276.

ground that she was brought to contradict the testimony of her husband, even where he was the prosecutor of an indictment (*v*).

§ 1370 (*x*). On the rule which precludes husbands and wives from giving testimony for or against each other in criminal proceedings, a necessary exception has been engrafted at common law, when a personal injury has been committed by the one against the other. Were it not for this exception, the wife would be exposed without remedy to brutal treatment (*y*). If, therefore, a man be indicted for the forcible abduction of a woman with intent to marry her (*z*), she is clearly a competent witness against him, if the force were continuing against her till the marriage. Of this last fact also she is a competent witness; and the better opinion seems to be, that she is still competent, notwithstanding her subsequent assent to the marriage, and her voluntary cohabitation; for, otherwise, the offender would take advantage of his own wrong (*a*). So, on an indictment for the fraudulent abduction of an heiress, the lady has been admitted as a witness for the prosecution (*b*). So, a wife may testify against her husband on an indictment for assisting at a rape committed on her person (*c*); or, for an assault and battery upon her (*d*); or, for maliciously shooting (*e*), or attempting to poison (*f*), her; or, it seems, for any other offence against her liberty or person (*g*). She may also exhibit articles of the peace against him, in which case her affidavit will not be allowed to be controlled and overthrown by his own (*h*). Indeed, East considers it to be settled, that, "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other" (*i*). But

(*v*) *R.* v. *Houlton*, (1823) Jebb, C. C. 24.

(*x*) Gr. Ev. § 343, in part.

(*y*) See *Bentley* v. *Cooke*, (1784) 3 Doug. 424.

(*z*) Under 24 & 25 V. c. 100, s. 54.

(*a*) *R.* v. *Wakefield*, (1827) trial published by Murray; 2 Lewin C. C. 279; *Brown's Case*, (1675) 1 Ventr. 243; *Perry's Case*, cited in *R.* v. *Serjeant*, (1826) Ry & M. 352; M'Nally, Ev. 179, 180; 3 Chit. Cr. L. 817, n. *y*.

(*b*) *R.* v. *Yore*, (1839) 1 Jebb & Sy. 563. This case was decided on the Irish Act, now repealed, of 10 G. 4, c. 34, s. 23. The law is re-enacted in 24 & 25 V. c. 100, s. 53.

(*c*) *Ld. Audley's Case*, (1631) 3 How. St. Tr. 402, 413; B. N. P. 287; *R.* v. *Jellyman*, (1838) 8 C. & P. 604.

(*d*) B. N. P. 287; *R.* v. *Azire*, (1738) 1 Str. 633; *Soule's Case*, (1828) 5 Greenl. 407.

(*e*) *R.* v. *Whitehouse*, cited 3 Russ. C. & M. 625.

(*f*) *R.* v. *Jagger*, (1797) cited 3 Russ. C. & M. 625.

(*g*) Per Hullock, B., in *R.* v. *Wakefield*, (1827), trial published by Murray, 257.

(*h*) *R.* v. *Doherty*, (1810) 13 East, 171; 12 R. R. 315; *Ld. Vane's Case*, (1744) 2 Str. 1202; *R.* v. *Ld. Ferrers*, (1758) 1 Burr. 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; *Lady Lawley's Case*, B. N. P. 287; or, on a *habeas corpus* sued out by him, for the same object, *R.* v. *Mead*, (1758) 1 Burr. 542.

(*i*) 1 East, P. C. 455; *The People*, ex. rel. *Ordronaux* v. *Chegaray*, (1836) 18 Wend. 642.

though competent as a witness, it is not indispensable that such party should be called (*k*); and Mr. Justice Holroyd seems to have thought, that the husband or wife could only be admitted to prove facts, which could not be proved by any other witness (*l*). Still, it may fairly be questioned whether this be not restricting the rule within too narrow bounds. For many years doubts were entertained whether a wife was, or was not, an admissible witness against her husband, in cases where he was proceeded against, under the Vagrancy Act (*m*), as a rogue and vagabond for deserting her, and for causing her to become chargeable to the parish (*n*). These doubts were resolved in the negative (*o*).

§ 1371. It must here be noted that the exception illustrated in the last section was confined to mere personal injuries, and consequently, a husband was not permitted to give evidence against his wife or her paramour, where the two offenders were indicted conjointly for stealing his property at the time of their elopement (*p*). However, this unsatisfactory state of the law has now, by the joint operation of two statutes (*q*), been remedied, and in any criminal proceeding, whether brought by a wife against her husband "for the protection and security of her own separate property," or brought by a husband against his wife with respect to his property, the spouses respectively "shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence" (*r*).

§ 1372 (*s*). In cases of *high treason*, the question, whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both sides. The affirmative of the question is maintained (*t*), on the ground of the extreme necessity of the case, and the nature of the offence, tending, as it does, to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. But, on the other hand, it is argued, that these political reasons are not sufficient to support an exception to a rule of general utility, and that, as the wife is not bound to discover her husband's treason (*u*), by parity of

(*k*) *R.* v. *Pearce*, (1840) 9 C. & P. 668.
(*l*) In *R.* v. *Whitehouse*, cited 3 Russ. C. & M. 625.
(*m*) 5 G. 4, c. 83, s. 4; amended by 34 & 35 V. c. 112, s. 15; by 47 & 48 V. c. 43; and by 54 & 55 V. c. 70, s. 7.
(*n*) *Sweeney* v. *Spooner*, (1863) 32 L. J. M. C. 82; 3 B. & S. 329.
(*o*) *Reeve* v. *Wood*, (1865) 34 L. J. M. C. 15; 5 B. & S. 364. See now 61 & 62 V. c. 36.
(*p*) *R.* v. *Brittleton & Bates*, (1884) 12 Q. B. D. 266; 53 L. J. M. C. 83.
(*q*) 45 & 46 V. c. 75, ss. 12, 16; amended by 47 & 48 V c. 14, s. 1.
(*r*) 47 & 48 V. c. 14, s. 1.
(*s*) Gr. Ev. § 345, in great part.
(*t*) B. N. P. 286; 1 Gilb. Ev. 252; *Grigg's Case*, (1672) T. Ray. 1.
(*u*) 1 Brownl. 47.

reason, she is not compellable to testify against him (*v*). The latter is perhaps the better opinion.

§ 1372A. In recent years the Legislature, recognising the inconvenience and injustice of the common-law rule as to the incompetency of witnesses in criminal cases, has, in many statutes dealing with specific offences, enacted that persons charged with the offence and their husbands and wives might be permitted to give evidence for the defence: thus, the Criminal Law Amendment Act, 1885 (*x*), which created several new offences against women and children, provided that a person charged with any offence, either under that Act, or with certain offences under specified sections of 24 & 25 V. c. 100, and the husband or wife of such person, should be competent but not compellable to give evidence. Evidence given by a prisoner pursuant to this provision may be used to convict him of another charge (*y*). So, also, the Law of Libel Amendment Act, 1888 (*z*), rendered persons charged with the offence of libel before any court of criminal jurisdiction, and their husbands and wives, competent but not compellable witnesses. The Evidence Act, 1877 (*a*), enacts that on the trial of an indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river or bridge, and of any other indictment or proceeding instituted for the purpose of trying and enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence. Altogether, from the year 1872 to the end of the year 1897, some twenty-seven Acts were passed, varying slightly in their terms, rendering such persons competent witnesses (*b*).

(*v*) 1 Hale, 301; 2 Hawk. c. 46, § 82; Bac. Abr., tit. Ev. A. 1; 1 Chit. Cr. L. 595; M'Nally, Ev. 181.

(*x*) 48 & 49 V. c. 69.

(*y*) *R.* v. *Owen*, (1888) 20 Q. B. D. 829; 57 L. J. M. C. 46.

(*z*) 51 & 52 V. c. 64, s. 9.

(*a*) 40 & 41 V. c. 14. This provision is still in force, and is not affected by the Criminal Evidence Act, 1898, see *post*, § 1372A.

(*b*) In addition to the instances mentioned in the text such a right was given in certain cases by the following Acts:—The Mines Regulation Act, 1872 (35 & 36 V. c. 76), repealed by 50 & 51 V. c. 58; the Metalliferous Mines Regulation Act, 1872 (35 & 36 V. c. 77); the Licensing Act, 1872 (35 & 36 V. c. 94), repealed by 10 Edw. 7 and 1 G. 5, c. 24; the Explosives Act, 1875 (38 & 39 V. c. 17); the Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 63); the Conspiracy and Protection to Property Act, 1875 (38 & 39 V. c. 86); the Threshing Machines Accidents Prevention Act, 1878 (41 & 42 V. c. 12); the Army Act, 1881 (44 & 45 V. c. 58); the Explosive Substances Act, 1883 (46 & 47 V. c. 3); the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 V. c. 51); the Married Women's Property Amendment Act, 1884 (47 & 48 V. c. 14); the Merchandise Marks Act, 1887 (50 & 51 V. c. 28); the Coal Mines Regulation Act, 1887 (50 & 51 V. c. 58), repealed by 1 & 2 G. 5, c. 50; the Public Health (London) Act, 1891 (54 & 55 V. c. 76); the Betting and Loans (Infants) Act, 1892 (55 V. c. 4); the Prevention of Cruelty to Children Act, 1894 (57 & 58 V. c. 41),

§ 1372B. The incompetency of defendants and their husbands and wives to give evidence for the defence in criminal proceedings was finally swept away by the Criminal Evidence Act, 1898 (*c*), which enacts that "every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person." The Act further provides that the person charged shall not be called as a witness in pursuance of the Act except upon his own application (*d*), and that the wife or husband of the person charged shall not be called as a witness except upon the application of the person charged in any other cases than those mentioned in the schedule to the Act (*e*), and those in which the wife or husband of a person charged may at common law be called without the consent

(repealed by 4 Ed. 7, c. 15); the Building Societies Act, 1894 (57 & 58 V. c. 47); the Diseases of Animals Act, 1894 (57 & 58 V. c. 57); the Merchant Shipping Act, 1894 (57 & 58 V. c. 60); the Law of Distress Amendment Act, 1895 (58 & 59 V. c. 24); the False Alarms of Fire Act, 1895 (58 & 59 V. c. 28); the Factory and Workshop Act, 1895 (58 & 59 V. c. 37), repealed by 1 Ed. 7, c. 22; the Corrupt and Illegal Practices Act, 1895 (58 & 59 V. c. 40); the Chaff Cutting Machines (Accidents) Act, 1897 (60 & 61 V. c. 60).

(*c*) 61 & 62 V. c. 36.

(*d*) S. 1 (*a*).

(*e*) These are:—Prosecutions under the Vagrancy Act, 1824 (5 G. 4, c 83), for neglecting to maintain or deserting his wife or any of his family; under section 80 of the Poor Law (Scotland) Act, 1845 (8 & 9 V. c. 83); under sections 48—55 of the Offences against the Person Act, 1861 (24 & 25 V. c. 100); under sections 12 and 16 of the Married Women's Property Act, 1882 (45 & 46 V. c. 75); under the Criminal Law Amendment Act, 1885 (48 & 49 V. c. 69); under the Incest Act, 1908 (8 Ed. 7, c. 45); under the Second Part of the Children Act, 1908 (8 Ed. 7, c. 67), or for any of the offences mentioned in the First Schedule to that Act; under section 56 of the Mental Deficiency Act, 1913 (3 & 4 G. 5, c. 28); and under section 46 of the Mental Deficiency and Lunacy (Scotland) Act, 1913 (3 & 4 G. 5, c. 38). The wife or husband of the person charged, although a competent witness for the prosecution in these cases is not compellable to give evidence: *Leach* v. *Rex*, [1912] A. C. 305; 81 L. J. K. B. 616. The Prevention of Cruelty to Children Act, 1904 (4 Ed. 7, c. 15), s. 12 (as amended by 8 Ed. 7, c. 67), provides "that in any proceeding for an offence under this Act such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend and give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." The Criminal Law Amendment Act, 1912 (2 & 3 G. 5, c. 20), s. 7 (6), provides that "the wife or husband of a person charged with an offence under either of the said Acts may be called as a witness either for the prosecution or defence and without the consent of the person charged, but nothing in this provision shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person." The Acts referred to are the Vagrancy Act, 1898 (61 & 62 V. c. 39) and the Immoral Traffic (Scotland) Act, 1902 (2 Ed. 7, c. 11). The Children (Employment Abroad) Act, 1913 (3 & 4 G. 5, c. 7), s. 3 (4), provides that "the wife or husband of a person charged with an offence under this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged." The Criminal Justice Administration Act, 1914 (4 & 5 G. 5, c. 58), s. 28 (3), provides that the wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

of that person (*f*). The Act, however (*g*), re-affirms the old common-law rule that was retained by the Evidence Amendment Act, 1853 (*h*), when authorising husbands and wives to give evidence in civil suits, namely, that husbands and wives shall not be compellable to disclose any communication made between them during the marriage (*i*). The provision authorising a person charged to give evidence "at every stage of the proceedings," enables a fugitive criminal to give evidence upon the hearing of the extradition proceedings (*k*). It does not, however, give a person charged any right to give evidence before the grand jury (*l*), but it entitles him to give evidence on oath in mitigation of sentence after he has pleaded guilty (*m*). The accused ought to be informed of his right to give evidence, but failure to do so will not render the trial invalid (*n*). Should the accused, in giving evidence under the Act, commit perjury he may be prosecuted therefor in the same manner as any other witness (*o*).

§ 1372C. The Act contains various provisions for the protection of the person charged; thus, his failure to give evidence must not be made the subject of any comment by the prosecution (*p*); nor may he be asked, or required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—(i) the proof that he has committed or been convicted of such other offence, is admissible evidence to show that he is guilty of the offence wherewith he is then charged (*q*); or (ii) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence (*r*). He may, however, be asked questions in cross-examination which tend

(*f*) 61 & 62 V. c. 36, ss. 1 (*c*), 4 (1), (2). In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section 36 of the Criminal Procedure (Scotland) Act, 1885 : see s. 5.

(*g*) By s. 1 (*d*).

(*h*) 16 & 17 V. c. 83, s. 3.

(*i*) As to the scope of this rule, see §§ 909, 910.

(*k*) *R.* v. *Kams*, Times 28th April, 1900, referred to in Biron and Chalmers on Extradition, p. 41.

(*l*) *R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83.

(*m*) *R.* v. *Wheeler*, [1917] 1 K. B. 283; 86 L. J. K. B. 40.

(*n*) *R.* v. *Saunders*, (1898) 63 J. P. 24.

(*o*) *R* v. *Wookey*, (1899) 63 J. P. 409.

(*p*) 61 & 62 V. c. 36, s. 1 (*b*).

(*q*) See *R.* v. *Rhodes*, *supra*, also §§ 345—347, *supra*.

(*r*) S. 1 (*f*).

to criminate him as to the offence charged (*s*). The Act further provides that persons giving evidence in pursuance of its provisions shall do so from the witness-box or other place from which the other witnesses give their evidence, unless otherwise ordered by the court (*t*); that the accused shall, notwithstanding the Act, be still entitled to make a statement without being sworn as formerly (*u*); and that in cases where the right to reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution any right of reply (*v*). Although the failure of a prisoner to give evidence must not be made the subject of any comment by the prosecution, it has been held that the court itself may comment upon the fact to the jury (*x*). It is submitted, however, that such right should be sparingly exercised. When one prisoner gives evidence on oath inculpating another charged on a joint indictment, he is liable to be cross-examined by, or on behalf of, that other (*y*).

§ 1372D. The continual recurrence in criminal trials of circumstances giving occasion for considering the applicability of section 1 (F) (ii) renders a correct appreciation of the provisions of that sub-section of the highest importance to those who administer criminal law, and attempts have been made, which have unhappily proved unsuccessful, to enunciate some principle which would afford the desired guidance for the correct application of the sub-section. It is hopeless to attempt to extract any principle from the authorities: all that can be done is to state the cases which have occurred and the manner in which they have been decided, and then to refer the reader to the language of the sub-section itself. The decisions may at any rate serve as sign-posts to indicate the direction in which danger lies.

By section 1 (F) (ii) "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, *or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.*"

(*s*) S. 1 (*e*).
(*t*) S. 1 (*g*).
(*u*) S. 1 (*h*).
(*v*) S. 3.
(*x*) *R.* v. *Rhodes*, *supra*; and see *Kops* v. *R.*, [1894] A. C. 650; 64 L. J. P. C. 34.
(*y*) *R.* v. *Hadwen*, [1902] 1 K. B. 882; 71 L. J. K. B. 581.

The part of the sub-section which is printed in italics is that in respect of which difficulties have arisen.

The following points have arisen under it:—

(1) Upon the trial of an indictment for conspiring by false pretences to induce the prosecutor to sell a mare, the prosecutor gave evidence that one of the defendants had previously offered to buy the mare on credit. The defendant in question was called as a witness for the defence, and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" To which he replied, "No, it is a lie, and he is a liar." Counsel for the prosecution was thereupon permitted to cross-examine defendant as to previous convictions. Conviction quashed on the ground that defendant's answer amounted only to an emphatic denial of the truth of the charge against him (*z*). This case establishes that if an answer, if given in temperate language, would not cause the prisoner to lose the protection of the statute, such protection will not be lost merely because his language is intemperate (*a*).

(2) A prisoner who was arrested in possession of stolen property said, in answer to the charge, that he was acting under instructions from a detective named Moss, and at the trial at Quarter Sessions the detective was cross-examined as to whether he had not employed the prisoner as an informer. The Recorder, thereupon, allowed the prisoner to be cross-examined as to previous convictions. Conviction quashed. Lord Alverstone, C.J., said, "It seems to me on the whole statement the prisoner's counsel was not doing more than developing his defence that the prisoner believed that he was acting under Moss's directions, and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the detective's general character (*b*).

(3) Indictment for rape. Defence: consent. Mr. Justice Day ruled that this involved an imputation on the character of the prosecutrix (*c*). Mr. Justice Jelf, on a trial where the indictment and defence were similar, ruled the opposite (*d*).

(4) Indictment for murder. Prisoner alleged that deceased was

(*z*) *R.* v. *Rouse*, [1904] 1 K. B. 184; 73 L. J. K. B. 60; *R.* v. *Grant*, (1909) 26 Times R. 60.

(*a*) See, also, *R.* v. *Bridgwater*, [1905] 1 K. B. 134; 71 L. J. K. B. 581.

(*b*) *R.* v. *Bridgwater*, *supra*. It will be observed that the protection of the statute was here conceived as depending in whole or in part upon whether the assumed imputation was wanton or *bona fide* believed to be necessary to the defence. See also *R.* v. *Preston*, [1909] 1 K. B. 568; 78 L. J. K. B. 335; *R.* v. *Westfall*, (1912) 28 Times R. 297; *R.* v. *Jones*, (1909) 26 Times R. 59; and *R.* v. *Watson*, (1913) 29 Times R. 450.

(*c*) *R.* v. *Fisher*, The Times, 31 Jan., 1899; 34 Law Journal 100.

(*d*) *R.* v. *Sheean*, (1908) 24 Times R. 459.

murdered by her husband, who was a witness for the prosecution. Held to let in cross-examination as to previous convictions (*e*).

(5) A material question was whether prisoner was the man who was seen near the place where the crime was committed. Two witnesses identified the defendant at the police station as the man in question, but a third person failed to identify prisoner as such man. With respect to this latter occasion, prisoner in his evidence stated that the police inspector, who was present on the occasion, and who gave evidence for the prosecution, said to the constable who was sent to bring the person in for the purpose of seeing whether he could identify prisoner "the second," or something like it; that he, the prisoner, was placed second from one end of a row of men; and that the person who was brought in did not pick him out, but picked out a man who was second from the other end. This being conceived as involving an imputation upon the conduct and character of the inspector, cross-examination was permitted as to previous convictions. No reliance was placed upon the above evidence in support of the defence, nor was the defence conducted upon the footing that the inspector's evidence ought not to be believed. Conviction quashed (*f*). The Court stated "the general nature of the enactment and the general principle underlying it," in the following terms: "It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner," &c. (*g*). And the Court expressed approval of *R.* v. *Bridgwater*, and went on to say that whilst the prisoner's evidence involved a serious imputation upon the conduct of a man holding the position of an inspector of police, yet "the allegation was made with reference to a matter which could not be said to be irrelevant. The prisoner was bound to give some evidence upon the subject of his identification at the police station. It may be said that if the matter is looked at carefully, and in a strictly logical manner, there was no real ground for bringing in that complaint against the police inspector, except to discredit him, because the identification upon the occasion in question had failed, and could only have been relevant as conveying an imputation on the character of the inspector. The answer to that is this: that the making of such an imputation was not in any way the substance of the defence; it was not part of the nature or conduct of the defence; and the observation was made upon a matter which,

(*e*) *R.* v. *Marshall*, (1899) 63 J. P. 36; and see *R.* v. *Hudson*, [1912] 2 K. B. 464; 81 L. J. K. B. 861.

(*f*) *R.* v. *Preston*, *supra*.

(*g*) To this statement of principle no exception has been taken.

whether it was judicious to introduce it or not, rendered it natural for the prisoner to make it. It seems to us that section 1 of the Act was not intended in a case like this to impose upon a prisoner such a penalty as the exposure to the jury of his previous character when he, without consideration, but not unnaturally, because it is connected with relevant matter, makes such a statement merely because upon careful examination one sees that the only real bearing it can have is to make an imputation on the character of a witness for the prosecution. The statement made by the prisoner in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within section 1 as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony" (*h*).

(6) A statement by the prisoner that the police officer who arrested him used improper violence in doing so is not an "imputation" on "character," nor is a suggestion made by him in cross-examination that the prosecutor is a habitual drunkard (*i*).

(7) The prisoner was charged with having stolen money and a bank-book from the prosecutor in a public-house. The prisoner and several other men were present at the time of the theft, and the bank-book was found in the prisoner's pocket. The defence set up was that one or more of the men had committed the theft and had put the bank-book into the prisoner's pocket, and when two of these men were called as witnesses for the prosecution they were questioned on behalf of prisoner with a view to show that they had committed the theft. Prisoner was cross-examined as to previous convictions. He was convicted, and appealed. The case (*k*) was argued before a court of five judges, specially so constituted for the purpose of considering *R.* v. *Bridgwater*, *R.* v. *Preston*, and *R.* v. *Westfall*. The Court dismissed the appeal, being clearly of opinion that the questions put on behalf of the prisoner were within the words of section 1 (F) (ii). They approved *R.* v. *Marshall*, saying, "where a prisoner, certainly when defended by counsel (*l*), has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section." The Court did not attempt to lay down affirmatively any principle for the application of the section, beyond the familiar general rule of construction: "We think that the words of the section 'unless the nature or con-

(*h*) In so far as this judgment was based upon the relevancy of the evidence given by the prisoner, it followed *R.* v. *Bridgwater*. The other grounds were new and original.

(*i*) *R.* v. *Westfall*, (1911) 28 Times R. 297.

(*k*) *R.* v. *Hudson*, [1912] 2 K. B. 464; 81 L. J. K. B. 861.

(*l*) The distinction here taken between an undefended and a defended prisoner presumably has reference to the question of possible inadvertence or the like on the part of an undefended prisoner.

duct of the defence is such as to involve imputations, &c.,' must receive their ordinary and natural interpretation,'' adding, negatively, '' It is not legitimate to qualify them by adding or inserting the words ' unnecessarily,' or ' unjustifiably,' or ' for purposes other than that of developing the defence,' or other similar words.''

The Court did not dissent from the actual decisions of *R.* v. *Bridgwater*, *R.* v. *Preston*, and *R.* v. *Westfall*, saying that all three cases may well be supported on grounds which did not touch the case under appeal. As to *R.* v. *Bridgwater*, they observed that the questions put to Moss did not involve any imputation on his character (*m*), and as to *R.* v. *Preston*, they appreciated that decision as being rested exclusively upon the view that the statement by the prisoner in that case was a mere unconsidered remark.

§ 1372E. When the only witness to the facts of the case called for the defence is the person charged, the Act provides (*n*) that he shall be called immediately after the close of the evidence for the prosecution; the effect of this provision and that contained in section 3 (*o*), is that in such a case the counsel for the prosecution sums up the case for the Crown immediately after the accused has given his evidence (*p*), and in so doing he is entitled to comment on the evidence given by the accused (*q*). Where a prisoner has given evidence on oath under the Act before the magistrates by whom he is committed for trial, his deposition may be put in evidence against him at the trial, although he then elects not to give evidence (*r*).

§ 1372F. The Act applies to all criminal proceedings, notwithstanding any enactment in force at the time of its commencement (*s*). It is, however, provided that nothing in the Act shall affect the Evidence Act, 1877 (*t*). The effect, therefore, is to establish a uniform practice in all criminal courts and cases, notwithstanding the provisions of the existing Acts authorising prisoners and their wives or husbands to testify; thus, where a prisoner was charged with an offence under the Prevention of Cruelty to Children Act, 1894 (*u*), and elected to give evidence, he could not be cross-examined as to previous convictions, although he might have been under the provisions of the last-mentioned Act (*v*).

(*m*) In this view it is to be regretted that the judgment in *R.* v. *Bridgwater* was not based simply on this plain ground.
(*n*) S. 2.
(*o*) *Ante*, § 1372 c.
(*p*) *R.* v. *Gardner*, [1899] 1 Q. B. 150; 68 L. J. Q. B. 42.
(*q*) *Id.*
(*r*) *R.* v. *Bird*, (1898) 79 L. T. 359; *R.* v. *Boyle*, (1904) 20 Times L. R. 192.
(*s*) S. 6.
(*t*) 40 & 41 V. c. 14. See *ante*, § 1372A.
(*u*) 57 & 58 V. c. 41. This Act is now repealed.
(*v*) *Charnock* v. *Merchant*, [1900] 1 Q. B. 474; 69 L. J. Q. B. 221.

§ 1372G. The Act does not apply to Ireland, but its provisions have been made applicable to proceedings in that country for offences against the Motor Car Act, 1903 (*x*); nor did the Act apply to proceedings in courts-martial until so applied by orders and rules made in pursuance of the Naval Discipline Act and the Army Act (*y*).

§ 1373. Another class of persons incompetent to testify includes witnesses, who, being called for the Crown in cases of high treason or misprision of treason, have not been included or properly described in a list duly delivered to the defendant. This head of incompetency rests on an Act passed in the seventh year of Queen Anne, which enacts (*z*), that "when any person is indicted for high treason, or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment [and of the jury], mentioning the names, profession, and place of abode of the said witnesses [and jurors], be also given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted, ten days before the trial, and in presence of two or more credible witnesses" (*a*). In strict law the list of witnesses should be delivered simultaneously with [the jury list and] the copy of the indictment, and that, too, ten days at least before the arraignment (for the word "trial" must, since the Jury Act, bear this interpretation) (*b*) and in the presence of two or more credible witnesses; yet any objection founded on the non-compliance with these regulations must be taken before the jury are sworn, and can only have the effect of postponing the trial (*c*). If, however, instead of raising any objection which goes to the array of witnesses, the defendant simply objects that some particular witness is incompetent, as not being included in the list, or as being misdescribed therein, this point, like any other question of competency, may be taken upon the *voire dire* when the witness is called, and if it prevails, he cannot be examined (*d*).

§ 1374. The Act, as we have seen, requires that the name, place of abode, and profession, of each witness should be stated in the list, the object of this regulation being, that the defendant should be

(*x*) 3 Ed. 7, c. 36, s. 19 (14).

(*y*) 61 & 62 V. c. 30, s. 6 (2). See Statutory Rules and Orders (1912), pp. 1253, 1265, 1275.

(*z*) 7 A., c. 21, s. 14; extended to Ireland by 17 & 18 V. c. 26. This last Act was passed in consequence of the decision of the House of Lords in *O'Brien* v. *R.*, (1849) 2 H. L. C. 465; 81 R. R. 243.

(*a*) This section is repealed, as to England, so far as relates to giving a list of the jury: 6 Geo. 4, c. 50, s 62.

(*b*) 6 G. 4, c. 50, s. 21; *R.* v. *Lord George Gordon*, (1781) 21 How. St. Tr. 648.

(*c*) *R.* v. *Watson*, (1817) 2 Stark. 139; *R.* v. *Frost*, (1840) 9 C. & P. 162—187; *O'Brien* v. *R.*, *supra*.

(*d*) *R.* v. *Frost*, *supra*.

enabled before the trial to make all due inquiry respecting the characters of the persons who are about to testify against him. It is not, however, necessary that the list should specify the particular house or street where the witness resides, but it will suffice if it describes him as living in a certain town or parish (*e*). So, if the witness has two or more residences, the list need only specify one; but if it aim at further particularity, and any one of the places of abode be misdescribed, this inaccuracy will vitiate the whole description (*f*). If the witness has recently changed his place of abode, the prisoner must be furnished with a description of his last residence, and it will not be sufficient to describe him as lately abiding at the former place (*g*).

§ 1375. The last class of persons rejected by the law as witnesses, includes all those who are incapable of comprehending the nature of an oath or affirmation, or of giving a moderately rational answer to a sensible question. It makes no difference from what cause this incapacity may arise; for whether it be occasioned by a congenital want of intellect, or by some temporary obscuration of the reasoning faculties, or by mere unripeness of understanding—whether the person be an idiot, a lunatic, a drunkard, or a child—he cannot, so long as the defect exists, be examined as a witness. The incapacity, however, is only co-extensive with the defect. Thus a monomaniac, or a person who is afflicted with partial insanity, will be an admissible witness, if the judge finds upon investigation that he is aware of the nature of an oath or declaration, and that he is capable of understanding the subject, with respect to which he is required to testify (*h*). So, in the case of total madness, the occurrence of a lucid interval (*i*)—in the case of intoxication, the return of sobriety (*k*)—will render the witness competent; and the judges will occasionally postpone trials of importance, if they have good cause to believe that the witness within a reasonable time will be able to testify, and if, without his testimony, the ends of justice will probably be defeated (*l*).

§ 1376 (*m*). The judges formerly held that persons *deaf and dumb* from their birth, were in contemplation of law idiots (*n*); but this

(*e*) *Id.* 147, 148.
(*f*) 9 C. & P. 151—153.
(*g*) *R.* v. *Watson*, *supra.*
(*h*) *R.* v. *Hill*, (1851) 2 Den. 254; 20 L. J. M. C. 222. See *Spittle* v. *Walton*, (1871) 11 Eq. 420; 40 L. J. Ch. 368.
(*i*) Com. Dig., Testmoigne, A. 1.
(*k*) *Hartford* v. *Palmer*, (1819) 16 Johns. 153; Hein. ad Pand., pars 3, § 14.
(*l*) *R.* v. *White*, (1786) 1 Lea. 430, n. *a*; 3 Bac. Ab. 202, n.
(*m*) Gr. Ev. § 366, in some part.
(*n*) *R.* v. *Steel*, (1787) 1 Lea. 452.

presumption is certainly no longer recognised (*o*), as persons afflicted with these calamities have been found, by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is adduced as a witness, the court, in the exercise of due caution, will take care to ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. When the judge is satisfied on these heads, the witness may be sworn and give evidence by means of an interpreter. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory method (*p*); but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs (*q*).

§ 1377. With respect to *children*, no precise age is fixed by law, within which they are absolutely excluded from giving evidence, on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must ever depend upon the good sense and discretion of the judge (*r*). In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding; and in *Brasier's Case* (*s*), which was an indictment for assaulting with intent to rape an infant, who was certainly under seven years of age (*t*), and perhaps

(*o*) *Harrod* v. *Harrod*, (1854) 1 K. & J. 9; 103 R. R. 1, per Wood, V.-C. If a deaf mute be put on his trial for felony, and the jury find that he cannot understand the proceedings, he will be detained as a non-sane person during the King's pleasure: *R.* v. *Berry*, (1876) 1 Q. B. D. 447; 45 L. J. M. C. 123.

(*p*) *Morrison* v. *Lennard*, (1827) 3 C. & P. 127; 33 R. R. 659.

(*q*) *Id.*; *R.* v. *Ruston*, (1786) 1 Lea. 408; *R.* v. *Steel*, (1786) *id.* 452; *The State* v. *De Wolf*, (1830) 8 Conn. 93; *Com.* v. *Hill*, (1817) 14 Mass. 207.

(*r*) The utter want of discretion in dealing with this subject, which has sometimes been evinced by the inferior functionaries of the law, is admirably ridiculed by Dickens in his "Bleak House." A little crossing-sweeper being brought up before a coroner, to give evidence on an inquest, the narrative thus proceeds:—"'Name Jo. Nothing else that he knows on. . . Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him arter he's dead, if he tells a lie to the gentleman, but believes it'll be something wery bad to punish him, and sarve him right—and so he'll tell the truth.' 'This won't do, gentlemen, says the coroner, with a melancholy shake of the head. 'Don't you think you can receive his evidence, sir?' asks an attentive juryman. 'Out of the question,' says the coroner; 'you have heard the boy; *can't exactly say* won't do, you know. We can't take *that* in a court of justice, gentlemen. It's *terrible depravity*. Put the boy aside.' Boy put aside; to the great edification of the audience; especially of little Swills, the comic vocalist."

(*s*) *R.* v. *Brasier*, (1779) 1 Lea. 199; *Jackson* v. *Gridley*, (1820) 18 Johns. 98.

(*t*) 1 Lea. 199. See *R.* v. *Perkin*, (1840) 2 Moo. C. C. 139, where Alderson, B., observed—"It certainly is not law that a child under seven cannot be examined as a witness. If he showe sufficient capacity on examination, a judge will allow him to

only five (*u*), all the judges held that she might have been examined upon oath, if, on strict examination by the court, she had been found to comprehend the danger and impiety of falsehood. But, in *Pike's Case* (*v*), Mr. Justice Park, with the concurrence of Mr. Justice Parke, promptly rejected the dying declarations of a child of four years of age, observing that, however precocious her mind might have been, it was quite impossible that she could have had sufficient understanding to render her declarations admissible. In certain cases, which will be found referred to elsewhere (*x*), it is provided by statute that unsworn evidence and depositions of children too young to understand the nature of an oath, may with certain qualifications be admitted.

§ 1378. It is here proper to observe that the law places no reliance on testimony not given on oath or affirmation (*y*). Consequently, in general, no person, whatever functions he may have to discharge in relation to the cause in question, or whatever be his rank, age (*z*), country (*a*), or belief can give testimony upon any trial, civil or criminal (*b*), until he have, in the form prescribed by law (*c*), given an outward pledge that he considers himself responsible for the truth of what he is about to narrate, and rendered himself liable to the temporal penalties of perjury, in the event of his wilfully giving false testimony (*d*).

§ 1379. Thus, although each juryman may apply to the subject before him that general knowledge which any man may be supposed

be sworn." See also *R.* v. *Holmes*, (1861) 2 F. & F. 788, where a child six years old was allowed to testify as to a rape having been committed on her, she having stated to the judge, Wightman, J., that she said her prayers, and thought it was wrong to tell lies.

(*u*) 1 East, P. C. 443.

(*v*) (1829) 3 C. & P. 598.

(*x*) As to depositions, see *ante*, § 491A, and as to evidence, *post*, §§ 1389A.

(*y*) As to affirmations, see *post*, §§ 1388—1390.

(*z*) *R.* v. *Brasier*, (1779) 1 Leach C. C. 199, overruling the opinion of Ld. Hale. See 1 Hale, 634.

(*a*) In some few of the British colonies, where the aborigines are "destitute of the knowledge of God and of any religious belief," ordinances have been made for the admission of the testimony of such persons without the previous sanction of an oath, and the legality of such ordinances has been recognised and established by the Legislature. See 6 & 7 V. c. 22.

(*b*) This law applies to courts-martial, see 44 & 45 V. c. 58, s. 52, sub-s. 3. A witness who commits perjury before a court-martial may, if subject to military law, be punished by court-martial, section 29; but if not so subject, he must be prosecuted before a civil court, section 126, sub-s. 2.

(*c*) See *Att.-Gen.* v. *Bradlaugh*, (1885) 14 Q. B. D. 667; 54 L. J. Q. B. 205.

(*d*) Where, however, a question arises in the course of a case, or on a subsequent appeal, as to a matter which has occurred within the knowledge of counsel in the case, such as the extent of an authority given to him by his client to compromise the litigation, the court will accept the statement of counsel made from his place at the bar without requiring it to be made on oath: *Kempshall* v. *Holland*, (1895) 14 R. 336; *Hickman* v. *Berens*, [1895] 2 Ch. 638; 64 L. J. Ch. 785.

to have, yet if he be personally acquainted with any material particular fact, he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict (*e*). So a judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn (*f*); and consequently, if he be the sole judge, it seems that he cannot depose as a witness (*g*), though if he be sitting with others, he may then be sworn and give evidence (*h*). In this last case, the proper course appears to be that the judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial (*i*), because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another (*k*). It must, however, be noticed, that on several occasions, when trials have been instituted before the House of Lords, peers, who have been examined as witnesses have, nevertheless, taken part in the verdict subsequently pronounced (*l*). But, perhaps, these cases are not inconsistent with the law as above stated, since in trials before the House of Lords, the peers must be regarded at least as much in the light of jurors as of judges; and it has been shown that a juryman is not disqualified from acting, simply by being called as a witness.

§ 1380. Again, though a Peer is privileged, while sitting in judgment, to give his verdict upon his honour (*m*), and was also permitted, under the old law, to answer a bill in Chancery upon his protestation of honour, and not upon his oath (*n*), he cannot be examined as a

(*e*) *R.* v. *Rosser*, (1836) 7 C. & P. 648; *Manley* v. *Shaw*, (1840) Car. & M. 361; 66 R. R. 870; *Bennet* v. *Hartford*, (1650) Sty. 233; *Fitz-James* v. *Moys*, (1663) 1 Sid. 133; *R.* v. *Heath*, (1744) 18 How. St. Tr. 123; *R.* v. *Sutton*, (1816) 4 M. & S. 532, 541, 542.

(*f*) *R.* v. *Anderson*, (1680) 7 How. St. Tr. 874; *Hurpurshad* v. *Sheo Dyal*, (1870) L. R. 3 Ind. App. 259, 286.

(*g*) *Ross* v. *Buhler*, (1824) 2 Mart. N. S. 312. But see 11 How. St. Tr. 459.

(*h*) *Trial of the Regicides*, (1660) Kel. 12.

(*i*) *Id.* As to when judges are not compellable to testify, see *ante*, § 938. In addition to authorities there cited, see *R.* v. *Gazard*, (1838) 8 C. & P. 595. A former editor of this work once saw Pollock B., when called as a witness, exercise his privilege of refusing to give evidence of matters which passed before him judicially. A judge may, however, give evidence as to any collateral fact which happened in his presence during the pendency of or after the trial: *R.* v. *Earl Thanet*, (1799) 27 How. St. Tr. 845.

(*k*) *Ross* v. *Buhler*, *supra*. So is the law of Spain; Partid. 3, tit. 16, l. 19; 1 Moreau and Carleton's Tr. p. 200; and of Scotland, Glassf. Ev. 602; Tait. Ev. 432; Stair, Inst. lib. 4, tit. 45, 4; Ersk., Inst. lib. 4, tit. 2, 33.

(*l*) *R.* v. *Earl Powis*, (1685) 7 How. St. Tr. 1384, 1458, 1552; *R.* v. *Earl of Macclesfield*, (1725) 16 How. St. Tr. 1252, 1391.

(*m*) 2 Inst. 49.

(*n*) *Mears* v. *Ld. Stourton*, (1711) 1 P. Wms. 146; Cons. Ord. Ch. 1860, Ord. XV. r. 6, now annulled by R. S. C. 1883, App. O.

witness in any cause, whether civil or criminal, or in any court of justice, whether it be an inferior court or the House of Lords, or in any manner, whether *viva voce*, or by interrogatories, or by affidavit, unless he be first sworn (*o*); for the respect which the law shows to the honour of a Peer, does not extend so far as to overturn the settled maxim, that *in judicio non creditur nisi juratis* (*p*). If, therefore, he refuses to take the necessary oath or affirmation, he will, notwithstanding the privileges of peerage or of Parliament, be guilty of a contempt for which he may be committed and fined (*q*). On a trial in Ireland, where the Lord Lieutenant was called as a witness, an attestation on honour, instead of an oath, was by mistake administered to him, and he was then examined and cross-examined, without any objection being taken to the reception of his evidence. Subsequently, a motion for a new trial was made, on the ground that the testimony of an unsworn witness had been received; but the court, having ascertained that the losing party had from the first been aware of the irregularity, very properly held that his objection came too late (*r*), and the rule was consequently discharged (*s*).

§ 1381. It seems that even the Sovereign could not now claim any exemption from the rule requiring oral testimony to be given upon oath (*t*), though, on one occasion, the simple certificate of King James I., as to what had passed in his hearing, was received as evidence in the Court of Chancery (*u*). The question whether the Sovereign could be examined as a witness at all, seeing that the evidence would be without temporal sanction, may admit of some doubt. The point arose in the reign of Charles I., when the Earl of Bristol, who was impeached for high treason, proposed to call the King, for the purpose of proving certain conversations which he had held with him while Prince. The subject was referred to the judges; but they, acting under the direction of his Majesty, forbore from giving any opinion, and the question remains to this day undetermined (*v*). In the *Berkeley Peerage Case*, counsel entertained some idea of calling the Prince Regent as a witness; but it ultimately became unnecessary to do so. On the whole, the better opinion seems to be, that the Sovereign, if so pleased, may be examined as a witness in any case, civil or criminal, but not without being sworn (*x*).

(*o*) 2 How. St. Tr. 772, n.; 7 How. St. Tr. 1458; 16 How. St. Tr. 1252; *R.* v. *Preston*, (1791) 1 Salk. 278; *Ld. Shaftesbury* v. *Ld. Digby*, (1676) 3 Keb. 631.

(*p*) *Mears* v. *Ld. Stourton*, (1711) 2 Salk. 512.

(*q*) 3 Salk. 278; 4 Ld. Brougham's Speech. 368.

(*r*) See *Richards* v. *Hough*, (1882) 51 L. J. Q. B. 361.

(*s*) *Birch* v. *Somerville*, (1852) 2 Ir. C. L. R. 243.

(*t*) 2 Roll. Abr. 686; *Omichund* v. *Barker*, (1745) Willes, 550.

(*u*) *Abignye* v. *Clifton*, (1612) Hob. 213.

(*v*) 2 Ld. Campbell's Lives of the Chanc., 510, 511.

(*x*) *Id.* in n. See an article in the Law Times, vol. 130, p. 365, on the case of *R.* v. *Mylius*, (1911), where the defendant was prosecuted for a libel upon King George V.

§ 1382 (*y*). The wisdom of requiring witnesses to be sworn, excepting under very special circumstances, cannot well be disputed; for, although the ordinary definition of an oath—*viz.*, "a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven, if he do not speak the truth" (*z*)—may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God—not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so—still, it must be admitted, that by thus laying hold of the conscience of the witness, the law best insures the utterance of truth (*a*). But as the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, persons, insensible to the obligations of an oath, ought not to be sworn. The repetition of the words of an oath would, in their case, be an unmeaning formality. The question, however, still remains:—should such persons be allowed to give testimony in courts of justice? and to this question, while the common law pronounces a negative (*b*), the Legislature has, in modern times, enacted that their testimony shall be received, for it is by the Oaths Act, 1888 (*c*), provided (*d*): "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath" (*e*).

§ 1383. It is the duty of the presiding judge to himself ascertain

(*y*) Gr. Ev. § 328, in some part.

(*z*) *R.* v. *White*, (1786) 1 Lea. 430; *The Queen's Case*, (1820) 2 Br. & B. 285; 22 R. R. 662.

(*a*) Tyler on Oaths, 12, 15. See a definition of an oath by Lord Coleridge, C.J., in *Att.-Gen.* v. *Bradlaugh*, (1885) 14 Q. B. D. 667; 54 L. J. Q. B. 205.

(*b*) B. N. P. 292; 1 Atk. 40. 45; *Maden* v. *Catanach*, (1862) 7 H. & N. 360; 31 L. J. Ex. 118; 126 R. R. 473.

(*c*) 51 & 52 V. c. 46.

(*d*) Section 1, the Army Act, 1881, contains a similar enactment with respect to witnesses summoned to give evidence before courts-martial, 44 & 45 V. c. 58, s. 52, sub-s. 4. In India every person who may by law be sworn, or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or solemn affirmation, make in place thereof a simple affirmation, omitting the words "So help me God," "In the presence of Almighty God," or other expressions of the same nature. Ind. Oaths Act, No. 6 of 1872.

(*e*) Section 2 directs that the form of oral declaration shall be as follows:—"I, A. B., do solemnly, sincerely, and truly declare and affirm." [*Then follow the words of the oath, omitting any imprecation or calling to witness.*] The validity of an oath is not to be affected by the person sworn having no religious belief: section 3. The form of affirmation in writing is also given in section 4. See also the Oaths Act, 1909 (9 Edw. 7, c. 39).

by questioning any witness who claims to affirm if he be entitled to do so (*f*). To render applicable the enactment contained in the Oaths Act, 1888; first, the person called as a witness must object to take an oath on the ground, and in the terms, set out in the Act; and secondly, he must also satisfy the presiding judge that he has no religious belief, or that the taking of an oath is contrary to it. A witness who states that he has a religious belief, but does not say that the taking of an oath is contrary thereto, cannot affirm (*g*). To render competent a witness whose objection to being sworn has not been taken in accordance with the provisions in the Oaths Act, which regulate of the mode of taking such an objection, it appears to be still necessary that such witness should be sworn in a manner which will be binding upon his conscience (*h*).

§ 1386. Lord Brougham's Act of 1851 to amend the Law of Evidence contains the following clause:—"Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively" (*i*). The Rules also of the Supreme Court, 1883, have provided that "any officer of the court, or other person directed to take the examination of any witness or person" (*k*); "each master of the Chancery Division, for the purpose of any proceedings directed to be taken before him" (*l*); and "the taxing officers of the Supreme Court, or of any Division thereof, for the purpose of any proceeding before them" (*m*); may respectively administer oaths. Order LXI. further provides by rule 5, that "every Master, and every first and second class clerk in the Central Office, shall, by virtue of his office, have authority to take oaths and affidavits in the Supreme Court." The Bankruptcy Act, 1914, also contains two sections on this subject. The first provides, that Official Receivers "may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer

(*f*) *R.* v. *Moore*, (1892) 61 L. J. M. C. 80.

(*g*) *Id.*

(*h*) As to this, see *infra*, § 1388. Before the Oaths Act, in *Omichund* v. *Barker*, (1755) Willes, 538, 545, the proper test of the competency of a witness to be sworn was settled, upon great consideration, to be, the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognised in *Butts* v. *Swartwood*, (1823) 2 Cowen, 431; *The People* v. *Matteson*, (1824) 2 Cowen, 433, 573, n.; and by Story, J., in *Wakefield* v. *Ross*, (1827) 5 Mason, 18. See, as to the Scottish Law, 2 Dickson, Ev. 849.

(*i*) 14 & 15 V. c. 99, s. 16. See also 18 & 19 V. c. 42, cited *post*, §§ 1567, 1568, which empowers diplomatic and consular agents abroad to administer oaths and do notarial acts.

(*k*) Ord. XXXVII. r. 19.

(*l*) Ord. LV. r. 16. See also r. 17.

(*m*) Ord. LXV. r. 27, sub-s. 25.

oaths " (*n*); and the second enacts, that, " for the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits " (*o*).

§ 1388 (*p*). All witnesses ought to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they deem binding on their consciences (*q*). This doctrine of the civil law—which in the great case of *Omichund* v. *Barker* (*r*) was settled to be also the rule at common law (*s*)—has received a legislative sanction by the Act of 1 & 2 V. c. 105; for that statute enacts, that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered in such form, and with such ceremonies as the parties sworn declare to be binding on their consciences. It has been further provided by the Oaths Act, 1888 (*t*), that if any person to whom an oath is administered desires to swear " with uplifted

(*n*) 4 & 5 G. 5, c. 59, s. 72 (2).

(*o*) *Id.*, Sch. II., s. 27.

(*p*) Gr. Ev. § 371, in part.

(*q*) " Quumque sit adseveratio religiosa, satis patet, jusjurandum attemperandum esse cujusque religioni." Hein. ad Pand. p. 3, §§ 13, 15. " Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, perjurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex suâ ipsius animi religione," &c. Bynk. Obs. Jur. Rom. lib. 6, c. 2. See also Puff. lib. 4, c. 2, § 4. The formula of taking an oath, which was anciently adopted by the Romans, was as follows :—The witness held a flint stone in his right hand, and dropped it as he uttered these words—Si sciens fallo, tum me Diespiter, salvâ urbe arceque, bonis ejiciat, ut ego hunc lapidem. Adam's Ant. 247. Cic. Fam. Ep. vii. 1, 12. Under the Christian emperors it was taken, invocato Dei Omnipotentis nomine, Cod. lib. 2, tit. 4, l. 41. Sacrosanctis evangeliis tactis, Cod. lib. 3, tit. 1, l. 14. And Constantine adds, in a rescript, Jurisjurandi religione testes, priusquam perhibeant testimonium, jamdudum arctari præcipimus, Cod. lib. 4, tit. 20, l. 9. In *Morgan's Case*, (1764) 1 Lea. 54, a Mahomedan was sworn thus :—First, he placed his right hand flat upon the Koran, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head : he then looked for some time upon it, and, on being asked what that ceremony was to produce, he answered that he was bound by it to speak the truth. In Scotland, members of the Kirk are sworn by the form of holding up the right hand, without touching the book or kissing it. *Mildrone's Case*, (1786) 1 Lea. 412; *Walker's Case*, (1788) *id.* 498; *Mee* v. *Reid*, (1791) Pea. 23. It seems that in this case the form of words may either be, " I, A. B., swear by God himself, as I shall answer to Him at the great day of judgment, that the evidence I shall give," &c.; or, " I swear according to the custom of my country and the religion I profess, that the evidence," &c. See 1 Lea. 412. A Jew is sworn on the Pentateuch with his head covered, Willes, 543; but if he professes Christianity, he may be sworn on the New Testament, though he has not formally renounced Judaism : *R.* v. *Gilham*, (1795) 1 Esp. 285. A Chinese is sworn by the ceremony of his breaking a saucer previously to the administration of the oath : *R.* v. *Entrehman*, (1842) C. & Marsh. 248. Roman Catholics are in England usually sworn upon a Testament, in the ordinary way, but in Ireland are sworn on a Testament, with a crucifix or cross upon it : M'Nally, Ev. 97.

(*r*) (1745) Willes, 538.

(*s*) Per Alderson, B., in *Miller* v. *Salomons*, (1852) 7 Ex. 534, 535; 21 L. J. Ex. 161; and per Pollock, C.B., *id.* 558.

(*t*) 51 & 52 V. c. 46, s. 5.

hand," in the form and manner common in Scotland, he shall be entitled to do so. The Oaths Act, 1909 (*u*), provides:—"2. (1) Any oath may be administered and taken in the form and manner following:—The person taking the oath shall hold the New Testament, or, in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath, the words 'I swear by Almighty God that . .' followed by the words of the oath prescribed by law. (2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question: Provided that, in the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any manner which is now lawful." Where it is necessary to ascertain what form of oath is binding, the court should inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding (*v*). Neither can a witness, who states that he is a Christian, be asked any further questions before he is sworn (*x*). If a witness, without objection, is sworn in the usual mode, but being of a different faith, the oath is not in a form affecting his conscience—as if, being a Jew, he is sworn on the Gospels—he is still punishable for perjury if he swears falsely, and the adverse party cannot for this cause have a new trial (*y*).

§ 1389. Irrespective of the recent relaxation of the law, so far as it relates to persons who either have no religious belief, or with whom the taking of an oath is contrary to that religious belief (*z*), the Legis-

(*u*) 9 Edw. 7, c. 39. This Act does not extend to Scotland.

(*v*) *The Queen's Case*, (1820) 2 Br. & B. 284; 22 R. R. 662.

(*x*) *R.* v. *Serva*, (1845) 2 Car. & K. 56, per Platt, B.

(*y*) *Sells* v. *Hoare*, (1822) 3 Br. & B. 232. *The State* v. *Whisenhurst*, (1823) 2 Hawks. 458. See *R.* v. *Wood*, (1841) Jebb & B. vii. Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question, the solution of which depends upon circumstances. If the omission of the oath was known at the time of the original trial, he will not. *Birch* v. *Somerville*, (1852) 2 Ir. C. L. R. 243, cited *ante*, § 1380; *Lawrence* v. *Houghton*, (1809) 5 Johns. 129; *White* v. *Hawn*, (1810) *id.* 351. But if it was not discovered till after the trial, he will; *Hawks* v. *Baker*, (1829) 6 Greenl. 72. See *Richards* v. *Hough*, (1882) 51 L. J. Q. B. 361.

(*z*) See *ante*, §§ 1382, 1383. The present is a convenient place to mention that, in addition to the provisions already set forth, enabling persons such as are mentioned in the text to give evidence in court upon affirmation, sections 1 and 4 of the Oaths Act, 1888, enable such persons to make statements in writing (otherwise affidavits) on affirmation in a form which commences:—I, , of , do solemnly and sincerely affirm," and the "jurat" to which runs, "Affirmed, &c., this day of , 19 Before me "

lature, out of regard for the conscientious scruples of certain religious sects (*a*), and of other persons endowed with peculiar moral susceptibilities, has allowed them, in the place of taking an oath, to make a solemn affirmation (*b*); but such affirmation has the same effect as an oath, and persons who knowingly affirm what is false are equally guilty of perjury with those who falsely swear. Thus, the Act of 3 & 4 W. 4, c. 49, allows Quakers and Moravians to affirm in all cases where an oath is required (*c*); and the Act of 1 & 2 V. c. 77—which was passed in consequence of the decision pronounced by the judges in *Doran's Case* (*d*)—extends the privilege to all persons who have been Quakers or Moravians, but have ceased to belong to either of those sects (*e*).

§ 1389A. An important exception to the general rule that all evidence must be upon oath or affirmation has been created by the Children Act, 1908 (*f*). It is there provided:—"Where, in any proceeding against any person for an offence any child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of that child may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of the child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of section 17 of the Indictable Offences Act, 1848 (*g*), or of this Part of this Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively: Provided that—(a) A person shall not be liable to be convicted of the offence unless the testimony

(*a*) Those who interpret literally our Saviour's injunction, "Swear not at all," ignore the fact that Christ Himself not only submitted to be sworn before the Sanhedrim, but actually refused to answer until He was put upon His oath by the high priest. See and compare 5th Ch. of St. Matt., vv. 34—37, and 26th Ch. of St. Matt., vv. 59—64.

(*b*) Since the year 1835, declarations have also, by virtue of the Act 5 & 6 W. 4, c. 62, been substituted on very many occasions for the oaths, whether official, or extra-judicial, or voluntary, which were formerly in use; and any person who wilfully and corruptly makes and subscribes any such declaration, knowing it to be untrue in any material particular, is guilty of a misdemeanour.

(*c*) This is the Form:—"I, A. B., being one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], do solemnly, sincerely, and truly declare and affirm," &c.

(*d*) (1838) 2 Moo. C. C. 37.

(*e*) This is the Form:—"I, A. B., having been one of the people called Quakers [*or* one of the persuasion of the people called Quakers, *or* of the United Brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm," &c.

(*f*) 8 Edw. 7, c. 67, s. 30. This section re-enacts and extends provisions originally appearing in 48 & 49 V. c. 69, and 57 & 58 V. c. 27. See also 4 & 5 G. 5, c. 58; and *R.* v. *Davies*, (1915) 140 L. T. Jo. 50.

(*g*) 11 & 12 V. c. 42.

admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused (*h*); and (b) Any child, whose evidence is received as aforesaid and who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury, shall, subject to the provisions of this Act, be liable on summary conviction to be adjudged such punishment as might have been awarded had he been charged with perjury and the case dealt with summarily under section 10 of the Summary Jurisdiction Act, 1879" (*i*).

§ 1390. It may here be noticed, as the practice was formerly different (*k*), that debtors and their wives, whether in England (*l*), or in Ireland (*m*), may now be examined upon oath by the Courts of Bankruptcy, concerning the debtor, his dealings, or property; and it appears that on the hearing of a bankruptcy petition, the petitioning creditor is entitled to call the debtor himself as a witness in support of the petition, for now that a debtor can petition for an adjudication of bankruptcy against himself, bankruptcy proceedings can no longer be considered for this purpose as being of a quasi-criminal nature (*n*).

§ 1391. The judges at Nisi Prius were at one time inclined to regard as incompetent to testify all persons, whether counsel, solicitors, or parties, who, being engaged in a cause, had actually addressed the jury on behalf of that side on which they were afterwards called upon to give evidence (*o*). Further investigation of the subject, however, has led to a judicial acknowledgment that no such rule of practice exists (*p*); although the obvious inconvenience of permitting one and the same person, first, to state the case as an advocate, and next, to prove that statement as a witness, appears to furnish ample justification for its immediate adoption (*q*); and it is not only in all cases an objectionable practice for the solicitor who is conducting a matter to himself also give evidence as a witness in it, but may even, in special circumstances, afford ground for a new trial (*r*). With

(*h*) The judge ought to point this out to the jury, but the Court of Criminal Appeal will not quash a conviction, where in their opinion the jury have not acted on the child's evidence alone: *R.* v. *Murray*, (1913) 30 Times R. 196.

(*i*) 42 & 43 V. c. 49.

(*k*) 24 & 25 V. c. 134, s. 211.

(*l*) 4 & 5 G. 5, c. 59, s. 25.

(*m*) 20 & 21 V. c. 60, ss. 306, 307.

(*n*) See *In re X. Y.*, [1902] 1 K. B. 98; 71 L. J. K. B. 102.

(*o*) *Stones* v. *Byron*, (1846) 4 D. & L. 393; 16 L. J. Q. B. 32; 75 R. R. 881; *Deane* v. *Packwood*, (1846) *id.* 395, n. *b*; 75 R. R. 883, per Erle, J. See Best, Ev. 250—258.

(*p*) *Cobbett* v. *Hudson*, (1852) 22 L. J. Q. B. 11; 1 E. & B. 11; 93 R. R. 1.

(*q*) *Id.*

(*r*) See *Deane* v. *Packwood*, *supra*.

respect to private prosecutors, it may be observed, that as they have no right to address the jury (*s*), even though they waive their title to give evidence on oath, they will not be permitted under any circumstances to act in the two-fold capacity of advocates and witnesses (*t*).

§ 1392. In regard to the proper time of taking the objection to the competency of a witness, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the examination-in-chief. Indeed, it has been frequently said by judges, and sometimes so held, that a party who is aware of the existence of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony (*u*). However, this doctrine has been disputed by the Court of Exchequer (*v*), and the learned Barons have held, in conformity with some old decisions (*x*), that the objection may be raised at any time during the trial, and that, too, whether the objector previously knew of the disqualification or not. The Court for Crown Cases Reserved has also decided that a judge had acted rightly, who, after pronouncing a witness competent on the *voire dire*, discovered during the examination that he was really incompetent, and consequently rejected his testimony, though part of it had already been reduced to writing (*y*). The rule on this subject is the same in equity as at law (*z*), and in criminal as in civil cases (*a*); but in trials for high treason, if the prisoner intends to object to a witness as being omitted from, or misdescribed in, the list furnished to him, he must do so

(*s*) *R.* v. *Gurney*, (1869) 11 Cox, 414.

(*t*) *R.* v. *Brice*, (1819) 2 B. & Ald. 606; *R.* v. *Milne*, cited *id.* n. *a*; *Cobbett* v *Hudson*, *supra*.

(*u*) *Dewdney* v. *Palmer*, (1839) 4 M. & W. 664; 8 L. J. Ex. 148; *R.* v. *Watson*, (1817) 2 Stark. 158; *R.* v. *Frost*, (1839) 9 C. & P. 183; *Beeching* v. *Gower*, (1816) Holt, N. P. 314; 17 R. R. 644; *Howell* v. *Lock*, (1809) 2 Camp. 14; *Donelson* v. *Taylor*, (1829) 8 Pick. 390, 392. In *Yardley* v. *Arnold*, (1840) 10 M. & W. 145; 11 L. J. Ex. 413, Parke, B., observed, "I cannot help wishing very much that it were established as the regular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the *voire dire*; and that, when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto." See also *Hartshorne* v. *Watson*, (1839) 5 Bing. N. C. 477; 7 L. J. C. P. 138; 44 R. R. 693; *Wollaston* v. *Hakewill*, (1841) 3 Man. & G. 297; 10 L. J. C. P. 303; 60 R. R. 517; and *Flagg* v. *Mann*, (1837) 2 Sumn. 487.

(*v*) *Jacobs* v. *Layborn*, (1843) 11 M. & W. 685; 12 L. J. Ex. 427.

(*x*) *Needham* v. *Smith*, (1704) 2 Vern. 463; *Ld. Lovat's Case*, (1746) 18 How. St. Tr. 596. See also *Stone* v. *Blackburn*, (1793) 1 Esp. 37; *Yardley* v. *Arnold*, *supra*.

(*y*) *R.* v. *Whitehead*, (1866) L. R. 1 C. C. R. 33; 35 L. J. M. C. 186.

(*z*) *Needham* v. *Smith*, (1704) 2 Vern. 463; *Vaughan* v. *Worrall*, (1817) 2 Madd. 322; *Selway* v. *Chappell*, (1841) 12 Sim. 113; 10 L. J. Ch. 323; *Swift* v. *Dean*, (1810) 6 Johns. 523, 538; Gresl. Ev. 234—236. See *Bousfield* v. *Mould*, (1847) 1 De G. & Sm. 347.

(*a*) *Ld. Lovat's Case* (1746) 18 How. St. Tr. 596; *Com.* v. *Green*, (1822) 17 Mass. 538.

before the witness is sworn in chief (*b*). In ordinary cases, if the objection to the competency of a witness be not taken until after the trial, it will be considered as coming too late; and the courts will not grant a new trial for this cause alone (*c*), unless the incompetency were known and concealed by the party producing the witness (*d*), or other evidence can be given of *mala praxis* on his part (*e*).

§ 1393. With respect to the mode of taking the objection, the witness should, in strictness, be examined upon the *voire* or *vraie dire*; that is, he should be sworn to answer truly "all such questions as the court shall demand of him." This peculiar form of oath is, however, now seldom administered; and the facts on which the objection rests, if not admitted by the opposite side, are elicited by questions put to the witness after being sworn in chief (*f*). Upon such an examination, the witness, if it be necessary, may speak to the contents of written documents without producing them (*g*). The objection may perhaps be also supported by evidence *aliundè*.

(*b*) *Ante*, § 1373.

(*c*) *Turner* v. *Pearte*, (1787) 1 T. R. 717; *Jackson* v. *Jackson*, (1825) 5 Cowen, 173. But see *Jacobs* v. *Layborn*, *supra;* 11 M. & W. 691. In *Barbat* v. *Allen*, (1852) 21 L. J. Ex. 156, Parke, B., referred to the Irish case of *Birch* v. *Somerville*, (1852) 2 Ir. C. L. R. 243, cited *ante*, § 1380, in which Ld. Clarendon was examined without being sworn, but the objection not having been insisted on at the time, the court refused to disturb the verdict.

(*d*) *Niles* v. *Brackett*, (1819) 15 Mass. 378.

(*e*) *Wade* v. *Simeon*, (1845) 2 C. B. 342; 15 L. J. C. P. 114; 69 R. R. 523.

(*f*) See *Jacobs* v. *Layborn*, *supra*.

(*g*) See *Butler* v. *Carver*, (1818) 2 Stark. 433; *R.* v. *Gisburn*, (1812) 15 East, 57; *Lunniss* v. *Row*, (1839) 10 A. & E. 606; *Carlisle* v. *Eady*, (1824) 1 C. & P. 234; *Quarterman* v. *Cox*, (1837) 8 C. & P. 97; *Butchers' Co.* v. *Jones*, (1794) 1 Esp. 160; *Botham* v. *Swingler*, (1794) *id.* 164; *Brockbank* v. *Anderson*, (1844) 7 Man. & G. 295, 313; 13 L. J. C. P. 102.

CHAPTER III.

EXAMINATION OF WITNESSES.

§ 1394. HAVING thus treated of the means of procuring the attendance of witnesses, and of their competency and credibility, the next subject to be considered is their examination. And here it may be laid down as a general proposition, that, "in the absence of any agreement in writing between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action, or at any assessment of damages, shall be examined *viva voce* and in open court" (*a*). In dealing with this rule it will be convenient, at the outset, to clear the ground of the exceptions embodied in it. And first, as to the agreement between the parties themselves to dispense with *viva voce* testimony. This, it will be seen, must be in writing, and, according to the strict language employed, should be made "between the solicitors of all parties." But suppose one of the parties has no solicitor, what is then to happen? Probably the stringency of the rule would be relaxed in his favour; and it may be, that a similar relaxation would be allowed, in the event of any party under disability appearing by a next friend or a guardian (*b*). It also seems that, although the parties have consented that the evidence at the trial should be taken by affidavit, either of them may, unless the agreement states that affidavits *alone* shall be used, supplement the documentary proof by oral testimony (*c*). Moreover, notwithstanding the agreement, the court, in the event of such a course being deemed necessary in the interests of justice, as, for instance, if the rights of infants be involved in the inquiry,—has authority, *ex mero motu*, to exclude the affidavits altogether, although they may have been duly taken and regularly filed, and to direct that they shall not be used as evidence at the trial, but that the witnesses themselves shall attend, and be examined orally in open court (*d*).

§ 1394A. The Railway and Canal Traffic Act, 1888 (*e*), provides

(*a*) R. S. C., Ord. XXXVII., R. 1. See *Att.-Gen.* v. *Metropolitan District Ry.*, (1880) 5 Ex. D. 218.

(*b*) See *Knatchbull* v. *Fowle*, (1876) 1 Ch. D. 604; *Fryer* v. *Wiseman*, (1876) 45 L. J. Ch. 199.

(*c*) *Glossop* v. *Heston & Isleworth Local Board*, (1878) 47 L. J. Ch. 536.

(*d*) *Lovell* v. *Wallis*, (1884) 53 L. J. Ch. 495, per Kay, J.

(*e*) 51 & 52 V. c. 25, s. 48.

that "on any rating appeal, and before any court, where it may be material to show the receipts or profits of a railway company, or railway and canal company, it shall be lawful for the company to prove the same by written statements or returns verified by the affidavit or statutory declaration of the manager or other responsible officer, and any such statements or returns shall be *prima facie* evidence of the facts therein stated with respect to such receipts or profits: provided that the person by whom any such affidavit or statutory declaration is made shall in every case, if required, attend to be cross-examined thereon."

§ 1395. We next come to the cases, where the Rules of 1883 interfere with the proposition stated in the last section; and here it is proposed to let the rules speak for themselves. First comes Order XXXVII., R. 1, which provides, that "the court or a judge may, at any time for sufficient reason (*f*), order that any particular fact or facts may be proved by affidavit; or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable (*g*); or that any witness whose attendance in court ought, for some sufficient cause, to be dispensed with, be examined by interrogatories or otherwise, before a commissioner or examiner. Provided that, where it appears to the court or judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit." In accordance with this last proviso, the court has refused to allow affidavits, which had already been used on an interlocutory application, to be read at the hearing, though it was proposed to supplement them by the oral evidence of the deponents and by their cross-examination (*h*).

§ 1396. The next rule is contained in Order XXXVIII., R. 1, which provides, that, "upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order (*i*) the attendance for cross-

(*f*) The Probate Division has declined to order the execution and attestation of a will to be proved in solemn form by affidavit, though none of the parties cited had appeared: *Cook* v. *Tomlinson*, (1876) 24 W. R. 851. Ord. XXX., r. 7, also provides for proving particular facts otherwise than by direct and positive *viva voce* evidence. See *ante*, § 393A.

(*g*) Accordingly, an affidavit which was not included in the master's certificate, may, by leave, be read on the further consideration of an action of which there has been no trial. *Dessan* v. *Lewin*, (1887) 52 L. T. 609. On the hearing, however, of a summons adjourned into court from chambers, affidavits cannot be read unless filed within the period allowed by the master: *Chifferiel* v. *Watson*, (1889) 58 L. J. Ch. 137.

(*h*) *Blackburn Guard.* v. *Brooks*, (1877) 7 Ch. D. 68; 47 L. J. Ch. 156.

(*i*) The making of an order is discretionary: see *La Trinidad* v. *Browne*, (1887) 36 W. R. 138; 57 L. J. Ch. 292.

examination of the person making any such affidavit" (*k*). It seems that, under the latter portion of this rule, the right to cross-examine the deponent would continue, though the affidavit were subsequently withdrawn by the party who had filed it (*l*). Moreover, it appears that an affidavit can be read, though the cross-examination is not concluded (*m*).

§ 1396A. Order XXXVII., R. 2, provides, that, "in default actions *in rem*, and in references in Admiralty actions, evidence may be given by affidavit." This rule, it will be seen, differs from the last, as it omits the proviso for the cross-examination of the deponents. Perhaps, however, that omission is immaterial; for by another general rule, viz., Order XXXVIII., R. 28, it is provided, that, "when the evidence is taken by affidavit, any party desiring to cross-examine a deponent, who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence, unless by the special leave of the court or a judge (*n*). The party producing such deponent for cross-examination, shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production" (*o*). The party receiving notice under the above rule, is, by Rule 29, "entitled to compel the attendance of the deponent for cross-examination, in the same way as he might compel the attendance of a witness to be examined."

§ 1396B. Whenever affidavits are used they must be "confined to such facts as the witness is able of his own knowledge to prove,

(*k*) As to cross-examination in cases commenced by an originating summons, see *Alexander* v. *Calder*, (1885) 28 Ch. D. 457. Qu., whether deponents out of the jurisdiction, whose affidavits have been filed, can be required to be produced for cross-examination : *Concha* v. *Concha*, (1886) 11 A. C. 541; 56 L. J. Ch. 257; *The Parisian*, (1887) 13 P. D. 16; 57 L. J. P. D. & A. 13.

(*l*) See *Keogh* v. *Leonard*, (1877) I. R. 11 Eq. 365; *Re Quartz Hill Co., Ex parte Young*, (1882) 21 Ch. D. 642; 51 L. J. Ch. 940.

(*m*) *Lewis* v. *Jones*, (1886) 54 L. T. 260.

(*n*) This is not the exclusive penalty : see *Cornell* v. *Baker*, (1885) 29 Ch. D. 711; 54 L. J. Ch. 844n.

(*o*) This provision applies to a cross-examination before an examiner or a master as well as one at the trial : *Backhouse* v. *Alcock*, (1885) 28 Ch. D. 669; 54 L. J. Ch. 842. *Cf.*, however, *In re Knight*, *Knight* v. *Gardner*, (1883) 25 Ch. D. 297; 53 L. J. Ch. 183. Its effect is that the person producing the witness for cross-examination must bear the expense in the first instance : see *Mansel* v. *Clanricarde*, (1885) 54 L. J. Ch. 982. And this even though the witness be a party to the cause : *Cornell* v. *Baker*, *supra*.

except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted " (*p*). The exception here mentioned does not apply to any proceeding, which, though interlocutory in form, finally decides the rights of the parties; and if, in any such proceeding, an affidavit founded on information and belief be used, the party against whom it is adduced is not bound to contradict it, but he may treat it as evidence which is not admissible (*q*). In the event, however, of his not taking that course in the court below, he may be precluded from raising the objection before the Court of Appeal (*r*).

§ 1396C. In order to check prolixity or scurrility in affidavits, it is further provided by the Rules, first, that " the costs of every affidavit, which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same " (*s*); and next, that " the court or a judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client " (*t*). In addition to these powers, the court has an inherent power to take an unduly prolix or scandalous affidavit off the file (*u*).

§ 1396D. With the view of protecting as far as possible the court, when called upon to act on the evidence of affidavits, from being deceived either by intentional and direct falsehood, or by statements designedly coloured, or accidentally mis-recited (*v*), the following rules have been made:—

R. 8. " Every affidavit shall state the description (*x*) and true place

(*p*) Ord. XXXVIII., R. 3. An affidavit of information and belief, founded on statements made to the deponent by an informant, who declined to repeat them on affidavit unless subpœnaed, was not admitted on an interlocutory motion, in a case where the informant might have been, but was not, subpœnaed, and no irremediable injury could result from the exclusion of the evidence: *In re Anthony Birrell Pearce & Co.*, [1899] 2 Ch. 50; 68 L. J. Ch. 444. An affidavit of information and belief which does not state the source of the information and belief is wholly worthless, and ought not to be received as evidence in any shape whatever: *In re J. L. Young Manufacturing Co.*, [1900] 2 Ch. 753; 69 L. J. Ch. 868; *Lumley* v. *Osborne*, [1901] 1 K. B. 532; 70 L. J. K. B. 416; and see *Bidder* v. *Bridges*, (1884) 26 Ch. D. 1, per Ct. of App.; 53 L. J. Ch. 479, S. C., as to what affidavits will not satisfy the requirements of this rule.

(*q*) *Gilbert* v. *Endean*, (1878) 9 Ch. D. 259, per Ct. of App.

(*r*) *Id.*

(*s*) R. 3; *Walker* v. *Poole*, (1882) 21 Ch. D. 835; 51 L. J. Ch. 840; *Hill* v. *Hart-Davis*, (1884) 26 Ch. D. 470; 53 L. J. Ch. 1012.

(*t*) R. 11.

(*u*) *Hill* v. *Hart-Davis*, *supra*.

(*v*) See *D. of Northumberland* v. *Todd*, (1878) 7 Ch. D. 777; 47 L. J. Ch. 343.

(*x*) In giving the " description " of a deponent, in many cases " gentleman " is not sufficient (see *In re Horwood*, (1886) 55 L. T. 373), as, *e.g.*, if deponent has a trade or profession: *Spaddacini* v. *Keary*, (1889) 21 L. R. Ir. 553. But it may be

of abode of the deponent" (*y*); thus enabling the party against whom the affidavit is used, to make all necessary inquiries respecting the deponent's character and position in life.

R. 12. "No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall without leave of the court or a judge be read or made use of in any matter depending in court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, either by his initials or by the stamp of that office, nor in the case of an erasure, unless the words or figures, appearing at the time of taking the affidavit to be written on the erasure, are rewritten and signed or initialled in the margin of the affidavit by the officer taking it" (*z*).

R. 13. "Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. No such affidavit shall be used in evidence in the absence of this certificate, unless the court or judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent" (*a*).

§ 1396E. All affidavits must be properly entitled in the court and cause. On the Crown side of the King's Bench Division they must be entitled "In the High Court of Justice King's Bench Division" (*b*). If sworn in England (*c*) for the purpose of proceedings in the Supreme Court, they must be sworn either before a judge, or a district registrar (*d*), or a master, or the first or second clerk in the Central Office (*e*), or a master in the Chancery Division (*f*), or a commissioner to examine witnesses (*g*), or a commissioner to administer oaths (*h*).

sufficient for filing purposes: *Spence* v. *Dodsworth*, [1891] 1 Ch. 657; 60 L. J. Ch. 798.

(*y*) If this be omitted or illusory only, the affidavit will not be read: *Hyde* v. *Hyde*, (1889) 59 L. T. 523; 57 L. J. P. D. & A. 89. "Stock Exchange stockbroker" is not sufficient for a stockbroker: *Levin* v. *Levin*, (1889) 60 L. T. 317.

(*z*) A master has no jurisdiction to authenticate alterations by initialling them: *In re Clarke*, (1891) 65 L. T. 455.

(*a*) As to what ought to satisfy a court or judge see *Blaenkurn* v. *Longstaffe*, (1885) 54 L. J. Ch. 516.

(*b*) *R.* v. *Plymouth, &c., Ry.*, (1889) 37 W. R. 334.

(*c*) As to affidavits sworn out of England, see Ord. XXXVIII., R. 6, cited *ante*, § 12.

(*d*) Ord. XXXVIII., R. 4. (*e*) Ord. LXI., R. 5.

(*f*) Ord. LV., R. 16. (*g*) Ord. XXXVII., R. 19.

(*h*) Ord. XXXVIII., R. 4. As to their duty on taking an affidavit, see *Bourke* v. *Davis*, (1890) 44 Ch. D. 110. There is no power to take off the file an affidavit sworn before a commissioner whose commission has not been superseded, though he has been struck off the roll of solicitors: *Ward* v. *Gamgee*, (1891) 65 L. T. 610.

These last-named commissioners must also, in the jurat, "express the time when, and the place where," each affidavit has been taken, for "otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled, without the leave of the court or a judge" (*i*). Still, the Rules do not require that the person administering the oath should, in addition to signing his name, add, in the jurat, his title as commissioner (*k*).

§ 1396F. Under Rules 16 and 17 no affidavit shall be sufficient, if sworn before the solicitor acting for the party on whose behalf it is to be used, or before such solicitor's clerk, or partner, or agent, or correspondent, or before the party himself.

Rule 15 provides, that original affidavits, before being used, must be delivered to the proper officer for the purpose of being stamped and filed; but after an affidavit has been filed, an office copy of it, if duly authenticated with the seal of the office, "may in all cases be used." Notwithstanding, however, this general language, an affidavit that has been filed "before issue joined in any cause or matter," cannot, without leave of the court or a judge, be received at the hearing or trial, unless, within a month after issue joined, or further time specially allowed, notice in writing of its intended use be given by the one party to the other (*l*).

§ 1396G. Rules relating to affidavits, and corresponding in substance though not in words with those referred to in the last six sections, have been framed for use in the Bankruptcy Courts (*m*), and also in the Court for Divorce and Matrimonial Causes (*n*).

§ 1397. The rules on the subject of *viva voce* testimony, and affidavit evidence, which prevail in the county courts, are also substantially the same as those recognised in the Supreme Court, though expressed in different language. Order XVIII. of the County Court Rules, provides, by Rule 1, that "except where otherwise provided by these Rules, the evidence of witnesses shall be taken orally on oath, and where by these Rules evidence is required or permitted to be taken by affidavit, such evidence shall nevertheless be taken orally on oath, if the court, on any application before or at the trial or hearing, so directs." Rule 2 provides, that "the judge may at any time for sufficient reason order that any particular fact or facts may be

(*i*) *Id.*, R. 5. *Eddowes* v. *Argentine Land Co.*, (1890) 59 L. J. Ch. 392.

(*k*) *Ex parte Johnson, Re Chapman*, (1884) 26 Ch. D. 338; 53 L. J. Ch. 762; *Cheney* v. *Courtois*, (1863) 13 C. B. (N.S.) 634; 32 L. J. C. P. 116; 134 R. R. 681.

(*l*) Ord. XXXVII., R. 24.

(*m*) Bkptcy. Rules, RR. 49—60.

(*n*) Rules in Div. & Mat. Causes, RR. 138—146, 188. See also RR. 51—55, and *Williams* v. *Williams*, [1916] P. 130; 85 L. J. P. 137.

proved by affidavit, or that the affidavit of any witness may be read at the trial or hearing, on such conditions as he may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before an examiner; provided that, where it appears to the judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit. Rule 11 then provides, that, "where a party desires to use at the trial an affidavit by any particular witness, or an affidavit as to particular facts, as to which no order has been made under Rule 2 of this Order, he may, not less than four clear days before the trial, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall two clear days at least before the trial, give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof, unless the judge otherwise orders; and the judge may make such order as he may think fit as to the costs of or incidental to any such objection (*o*).

§ 1398. Besides the Supreme Courts, whether for England or Ireland, and the County Courts, the Legislature has conferred on many other tribunals (*p*) power to examine witnesses *viva voce*, whenever such a course shall be deemed desirable.

§ 1399. Passing on now to the cases in which *viva voce* evidence is required to be given, it becomes necessary to consider the manner in which witnesses ought to be examined. This subject lies chiefly in the discretion of the judge before whom the action is tried (*q*), being from its very nature susceptible of but few positive rules (*r*). The great object is to elicit the truth; but the character, intelligence, courage, interest, bias, memory, and other circumstances of witnesses are so various, as to require almost equal variety in the mode of interrogation, and the degree of its intensity, to attain that end.

(*o*) See further as to the Form and other requisites of affidavits when used in the County Courts, RR. 1—14 of Order XIX.

(*p*) See as to the Jud. Comm. of the Privy Council, 3 & 4 W. 4, c. 41, s. 7; as to the Eccles. Cts. 17 & 18 V. c. 47; as to the Ct. of Adm. for Irel., 30 & 31 V. c. 114, s. 50; and as to the Cts. of Bankruptcy in England, 4 & 5 G. 5, c. 109 (5); and in Irel., 20 & 21 V. c. 60, s. 369.

(*q*) *Bastin* v. *Carew*, (1824) Ry. & M. 127, per Abbott, C. J.

(*r*) When a foreigner ignorant of the English language is on trial on indictment for a criminal offence, and is not defended by counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by counsel the judge may dispense with the translation, if the prisoner or his counsel desire it, and the judge is of opinion that the prisoner substantially understands the nature of the evidence which is going to be given: *R.* v. *Lee Kun*, [1916] 1 K. B. 337; 85 L. J. K. B. 515.

§ 1400 (*s*). If the judge deems it essential to the discovery of truth, that the witnesses should be examined out of the hearing of each other, he will order them all on both sides to withdraw, excepting the one under examination (*t*); and this order, upon the motion of either party at any period of the trial (*u*), is rarely withheld, though it cannot be demanded of strict right (*v*). The parties themselves will not usually be included in the order to withdraw, and indeed it is doubtful if they can be (*x*): in a modern case, however (*y*), it has been held that parties may be ordered out of court during the taking of the evidence, on the ground that the old rule as to not excluding parties originated when parties were considered incompetent as witnesses. This decision has not been expressly overruled; but the invariable practice has been, and is, to allow parties to be present in court throughout the trial, and it is submitted that the decision would not be followed. A party who has not instructed counsel would not be in a position to conduct his case, if he were liable to be excluded from the court. It is clear that a commissioner or special examiner must, by the express term of Rule 11 of Order XXXVII. allow parties to be present throughout the examination if they wish to be present, notwithstanding the fact that they are witnesses. It has, however, been held that the prosecutor in a criminal proceeding, in which it is proposed to examine him as a witness, may be ordered out of court (*z*). Where a solicitor in the cause is about to give testimony, an exception is usually allowed in his favour, upon a statement being made by counsel, that his personal attendance in court is necessary (*a*). So, medical or other professional witnesses, who are summoned to give scientific opinions upon the circumstances of the case, as established

(*s*) Gr. Ev. 432, in part.

(*t*) This order may, it seems, be made by an examiner. See *In re West of Canada Oil Land & Works Co.*, (1877) 6 Ch. D. 109; 46 L. J. Ch. 684.

(*u*) *Southey* v. *Nash*, (1837) 7 C. & P. 632; 48 R. R. 843.

(*v*) In *Southey* v. *Nash*, (1837) 7 C. & P. 632, Alderson, B., is reported to have held, that either party had a right to require that the unexamined witnesses should be out of court; but this ruling would seem not to be law, even in civil cases, see *Selfe* v. *Isaacson*, (1858) 1 F. & F. 194; and the contrary has repeatedly been held in criminal trials, see *R.* v. *Cook*, (1696) 13 How. St. Tr. 348; *R.* v. *Vaughan*, (1696) *id.* 494; *R.* v. *Goodere*, (1741) 17 *id.* 1015. In *R.* v. *Murphy*, (1837) 8 C. & P. 307, Coleridge, J., observed, that it was almost a matter of right for the opposite party to have a witness out of court, while any legal argument was going on respecting his evidence. A witness will not be ordered out of court during the reading of evidence on affidavit: *Penniman* v. *Hall*, (1875) 24 W. R. 245.

(*x*) In *Charnock* v. *Devings*, (1853) 3 Car. & K. 378, Talfourd, J., is reported to have held that he had no power to order the parties to leave the court so long as they behaved with propriety. See, also, *Selfe* v. *Isaacson*, *supra*. *Sed qu.* as to this ruling.

(*y*) *Outram* v. *Outram*, (1877) W. N. 75.

(*z*) *R.* v. *Newman*, (1852) 3 Car. & K. 260; 22 L. J. Q. B. 156.

(*a*) *Everett* v. *Lowdham*, (1831) 4 C. & P. 91; *Pomeroy* v. *Baddeley*, (1826) Ry. & M. 430. But a special application must be made to except him, *R.* v. *Webb*, (1819) Ry. & M. 431, n.

by other testimony, will be permitted to remain in court, until this particular class of evidence commences; but then, like ordinary witnesses, they will have to withdraw, and to come in one by one so as to undergo a separate examination (*b*).

§ 1401 (*c*). If a witness remains in court in contravention of an order to withdraw, he renders himself liable to fine and imprisonment for the contempt (*d*); and, at one time, it was considered that the judge, in the exercise of his discretion, might even exclude his testimony (*e*). But it seems to be now settled, that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence (*f*). In revenue cases, indeed, as tried on the Revenue side of the King's Bench Division, a stricter rule is said to prevail; and in order to prevent any imputation of unfairness in these proceedings between the Crown and the subject, the testimony of any witness who has remained in court, whether contumaciously or not, after an order to withdraw, has hitherto been inflexibly rejected (*g*). This rule does not prevail in Ireland, at least in all its strictness (*h*); and as it may well be doubted whether the rule in itself is calculated to effect its object, perhaps, at the present day, it would not be rigidly enforced, even in England.

§ 1402. The practice of ordering witnesses out of court may be traced to a remote antiquity, it being noticed with approbation by Fortescue in his work De Laudibus Legum Angliæ (*i*); and no man who has reflected upon the nature of evidence, or even read the quaint story of Susannah narrated in the Apocrypha (*k*), but must acknowledge the utility of such a course, as an admirable means of

(*b*) See Alison, Pract. Cr. L. 489, 542—545; Tait, Ev. 420.

(*c*) Gr. Ev. § 432, in part.

(*d*) *Chandler* v. *Horne*, (1842) 2 M. & Rob. 423; 62 R. R. 819.

(*e*) *Parker* v. *M'William*, (1830) 6 Bing. 683; *Thomas* v. *David*, (1836) 7 C. & P. 350; 48 R. R. 794; *R.* v. *Colley*, (1827) M. & M. 329; *Beamon* v. *Ellice*, (1831) 4 C. & P. 585; *R.* v. *Wylde*, (1834) 6 C. & P. 380; *R.* v. *Lavin*, (1843) Ir. Cir. R. 813.

(*f*) *Chandler* v. *Horne*, *supra*, per Erskine, J., who stated that it was so settled by all the judges. See, also, *Cook* v. *Nethercote*, (1835) 6 C. & P. 743; 40 R. R. 855; *Doe* v. *Cox*, (1790) *id.* in n.; 40 R. R. 857 n.; *Cobbett* v. *Hudson*, (1852) 22 L. J. Q. B. 13; 1 E. & B. 14; 93 R. R. 1.

(*g*) *Att.-Gen.* v. *Bulpit*, (1821) 9 Price, 4; 23 R. R. 637; *Parker* v. *M'William*, *supra*; *Thomas* v. *David*, *supra*.

(*h*) *Att.-Gen.* v. *Sullivan*, (1842) 1 Arm. M. & O. 294, per Brady, C. B.

(*i*) His words are, "Et si necessitas exegerit, dividantur testes hujusmodi, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit aut concitabit eorum alium ad consimiliter testificandum." C. 26. See, also, *Williams* v. *Hulie*, (1663) 1 Sid. 131.

(*k*) Where Daniel detected the perjury of the two old judges, who, as eye-witnesses, had accused the wife of Joacim of adultery; but who, on being examined apart, differed as to the place where the crime was committed, the one swearing it was under a mastick tree, the other under a holm tree.

detecting conspiracy and falsehood. In order, however, to render the practice duly efficient, it is not enough to order the witnesses simply to withdraw out of hearing, but means should be afforded for keeping them in some separate room, until they are called for; so that they might lose the opportunity, not only of listening to the examination of those who preceded them, but, what is of equal importance, of conversing with them afterwards. In Scotland (*l*), all the witnesses on either side are usually shut up in an apartment by themselves, whence they are successively and separately called into court to be examined (*m*); and the system of separate examination also prevails theoretically, if not practically, in both Houses of Parliament (*n*).

§ 1403. When the competency of a witness, if objected to, is settled, he is first duly sworn in the cause by the crier (*o*) or other officer of the court. If he decline either to take the proper oath (*p*), or to make the proper affirmation, or if, after having been sworn, he refuse to give evidence, or to answer any question which the court holds that he is bound by law to answer, he is guilty of contempt, and may be punished accordingly. When such an offence is committed before any Division of the High Court (*q*), the refractory witness may be punished *instanter* by fine and imprisonment; nor is it necessary that the cause of commitment should be set out at length in the warrant (*r*). When a witness is guilty of a similar contempt before an inferior tribunal, the mode of dealing with him will in general depend upon the statutable powers with which the particular court

(*l*) It was formerly the law of Scotland, that if a witness was objected to as having remained in court without permission, his evidence could not be heard, but the Act of 3 & 4 V. c. 59, § 3, enacts, that "in any trial before any judge of the court of session or court of justiciary, or before any sheriff or steward of Scotland, it shall not be imperative on the court to reject any witness against whom it is objected that he or she has, without the permission of the court, and without the consent of the party objecting, been present in court during all or any part of the proceedings; but it shall be competent for the court, in its discretion, to admit the witness, where it shall appear to the court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

(*m*) Alison, Pract. of Cr. L., 542—545; Tait, Ev. 420; 2 Hume, Com. 189; 19 How. St. Tr. 331, n.

(*n*) *Taylor* v. *Lawson*, (1828) 3 C. & P. 543, per Best, C. J.

(*o*) *R.* v. *Tew*, (1855) Dears, 429.

(*p*) If in an administration suit an accounting party be subpœnaed for examination, he cannot refuse to be sworn on the ground that he has not received sufficient notice of the points on which he is to be examined, but after being sworn he may, according to what would seem to be an absurd rule,—object to answer for that reason. *Meyrick* v. *James*, (1877) 46 L. J. Ch. 38. See R. S. C., Ord. XXXIII., R. 5.

(*q*) See *Ex parte Fernandez*, (1861) 10 C. B. (N.S.) 3; 30 L. J. C. P. 321; 128 R. R. 575; *Ex parte Clement*, (1822) 11 Price, 68, 85; 23 R. R. 260.

(*r*) *Ex parte Fernandez*, *supra*. There the witness was fined £500, and sentenced to six months' imprisonment.

is clothed (*s*); but in all cases a refusal to discharge the duties of a witness is regarded in the light of a grave offence, as having a tendency to obstruct the course of public justice.

§ 1404. As soon as the witness has been duly sworn, it is the province of the party by whom he is produced to examine him (*t*). This is called his direct examination, or his examination in chief; and in this examination, *leading questions*,—that is, questions which suggest to the witness the answer desired (*u*), or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative (*v*),—are not, in general, allowed to be put (*x*). Still, this rule must be understood in a reasonable sense; for if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to the part of the examination (*y*), which is merely introductory of that which is material. With respect even to material points, the judge, in his discretion, will sometimes allow leading questions to be put in a direct examination; as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence (*z*), or where special circumstances render

(*s*) See as to the County Courts, 51 & 52 V. c. 43, s. 111, which enables the judge to impose a fine not exceeding £10 on the witness.

(*t*) Formerly in the Scotch courts, as soon as a witness was sworn, it was necessary for the judge to examine him *in initialibus*, that is, to ask him whether he had been instructed what to say, or had received or had been promised any good deed for what he was to say, or whether he bore any ill-will to the adverse party, or had any interest in the cause, or concern in conducting it; together with his age, and whether he was married or not, and the degree of his relationship to the party adducing him, Tait, Ev. 424; but now this course is no longer necessary, though it is still competent for the judge, or for the party against whom the witness shall be called, to examine him *in initialibus*, as heretofore, 3 & 4 V. c. 59, s. 2.

(*u*) 1 St. Ev. 169; 2 Ph. Ev. 401; Alison, Pract. of Cr. L. 545; Tait, Ev. 427; 24 How. St. Tr. 659, 660, n.

(*v*) *Nicholls* v. *Dowding*, (1815) 1 Stark. 81; 18 R. R. 746, per Ld. Ellenborough.

(*x*) For an early instance, see *R.* v. *Rosewell*, (1684) 10 How. St. Tr. 190; as to what will be regarded as leading interrogatories, see *Gregory* v. *Morychurch*, (1850) 12 Beav. 398; 19 L. J. Ch. 77; *Lincoln* v. *Wright*, (1841) 4 Beav. 166; 55 R. R. 132. See Greenleaf on Evidence (15th ed.), p. 569.

(*y*) *Nicholls* v. *Dowding*, *supra*.

(*z*) *Price* v. *Manning*, (1889) 42 Ch. D. 372; 58 L. J. Ch. 649; *R.* v. *Chapman*, (1838) 8 C. & P. 559; *R.* v. *Ball*, (1837) *id.* 745; *R.* v. *Murphy*, (1837) *id.* 306—308; *Clarke* v. *Saffery*, (1824) Ry. & M. 126; 27 R. R. 736; *Parkin* v. *Moon*, (1836) 7 C. & P. 409, per Alderson, B. See, also, 17 & 18 V. c. 125, s. 22, *post*, § 1426. The mere fact that the interest of the witness is necessarily adverse to that of the party calling him does not, in England, make such a course a matter of right: *Price* v. *Manning*, *supra*; disapproving *Clarke* v. *Saffery*, *supra*.

the witness rather the witness of the court than of the party (*a*). Where a litigant is called as a witness by the opposite party the latter is not entitled as a matter of right to cross-examine him as a hostile witness (*b*). Questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given (*c*), will not at any time be permitted. Reading over the evidence given on a former occasion is a form of putting a leading question which is permissible in certain cases (*d*).

§ 1405. Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by want of recollection, which a suggestion may assist. Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognise them if suggested, this was permitted to be done (*e*). So, for the purpose of identification, the witness may be directed to look at a particular person, and say whether he is the man (*f*). So (*g*), where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it; as, where he is called to contradict another respecting the contents of a lost letter, and cannot, off-hand, recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted (*h*). So, where a witness is called to contradict another, who has denied having used certain expressions, counsel are sometimes permitted to ask, whether the particular words denied were not in fact uttered by the former witness (*i*); but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible (*k*). Again, the court will sometimes allow a pointed or leading question to be put to a witness of tender years, whose attention cannot otherwise be called to the matter under investigation (*l*); and indeed, it must always be remembered, that the judge has a discretionary power,—not controllable by

(*a*) *Bowman* v. *Bowman*, (1843) 2 M. & Rob. 501, per Cresswell, J.

(*b*) *Price* v. *Manning*, *supra*.

(*c*) See *Hill* v. *Coombe*, (1818) cited 1 St. Ev. 188 (*n*); *Handley* v. *Ward*, (1818) cited 1 St. Ev. 188 (*n*).

(*d*) *Ex parte Bottomley*, [1909] 2 K. B. 14, at p. 21; 78 L. J. K. B. 547.

(*e*) *Acerro* v. *Petroni*, (1815) 1 Stark. 100.

(*f*) *R.* v. *Watson*, (1817) 32 How. St. Tr. 74; *R.* v. *Berenger*, (1817) 2 Stark. 129, n.

(*g*) Gr. Ev. § 435, in part.

(*h*) *Courteen* v. *Touse*, (1807) 1 Camp. 43; 10 R. R. 627.

(*i*) *Edmonds* v. *Walter*, (1820) 3 Stark. 8.

(*k*) *Hallett* v. *Cousens*, (1839) 2 M. & Rob. 238.

(*l*) *Moody* v. *Rowell*, (1835) 17 Pick. 498 (Am.).

the Court of Appeal (*m*),—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require (*n*).

§ 1406 (*o*). Though a witness can testify only to such facts as are within his own knowledge and recollection, he is sometimes permitted to refresh and assist his memory, by the use of a written instrument, memorandum, or entry in a book (*p*). But this course,—except in the case of scientific witnesses referring to professional books as the foundation of their opinions (*q*),—can only be adopted where the writing has been made, or its accuracy recognised, at the time of the fact in question, or, at furthest, so recently afterwards, as to render it probable that the memory of the witness had not then become defective (*r*). In one Scotch case, the majority of the court would not allow a witness to consult notes, which he had prepared some weeks after the transaction had occurred, and when he had reason to believe that he should be called to give evidence (*s*). And, in another case, the witness was not permitted to refresh his memory with the copy of a paper taken by himself six months after he made the original, though the original was proved to have become illegible; the learned judge saying, that the witness could only look at the original memorandum made near the time (*t*).

§ 1407. In all cases of this kind the practice must be governed by the peculiar circumstances; but, perhaps, if the witness will swear

(*m*) See *Lawdon* v. *Lawdon*, (1855) 5 Ir. C. L. R. 27.

(*n*) *Ohlsen* v. *Terrers*, (1874) L. R. 10 Ch. 127; 44 L. J. Ch. 155; *Moody* v. *Rowell*, *supra*.

(*o*) Gr. Ev. §§ 436, 438, in part.

(*p*) The law on this subject is thus laid down in the N. York Civ. Code, § 1843:—"A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So also a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution." Section 159 of the Ind. Ev. Act, 1872, is as follows:—"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct."

(*q*) As to this practice, see *post*, §§ 1422, 1423.

(*r*) *R.* v. *Horne Tooke*, (1794) cited 25 How. St. Tr. 936; *Burrough* v. *Martin*, (1809) 2 Camp. 112; *Smith* v. *Morgan*, (1839) 2 M. & Rob. 257; *Wood* v. *Cooper*, (1845) 1 Car. & K. 645.

(*s*) *R.* v. *Sir A. Gordon Kinloch*, (1795) 25 How. St. Tr. 934—937.

(*t*) *Jones* v. *Stroud*, (1825) 2 C. & P. 196; 31 R. R. 660.

positively, that the notes, though made *ex post facto*, were taken down at a time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred (*u*). If, however, the memoranda were prepared subsequently to the event at the instance of the party calling the witness, or of his solicitor, they can in no case be permitted to be used, for otherwise a door might be opened to the grossest fraud. Therefore, where a witness had drawn up a paper for the party calling him, after the cause was set down for trial, though eighteen months before the trial was actually heard, the court would not allow him to refer to it (*v*). And where a witness had herself noted down the transactions as they occurred, but had requested the solicitor for the party she supported to digest her notes into the form of minutes, which she had afterwards revised and transcribed, Lord Chancellor Hardwicke suppressed her deposition, she having had recourse to these minutes for the purpose of refreshing her memory (*x*).

§ 1408. Whether the witness can refresh his memory by referring to a mere copy of his original memorandum is a question of some difficulty and doubt (*y*). In several cases he has been allowed to do so, where, having looked at the copy, he was enabled to swear positively to the facts from his own recollection (*z*); but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness, either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy (*a*). Even then, it may be questionable whether the copy should be used, so long as the original is in existence, and its absence unexplained; for there is much weight in the remark of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself, or be merely used to refresh the memory (*b*).

(*u*) *R.* v. *Sir A. Gordon Kinloch*, *supra*; *Wood* v. *Cooper*, *supra*.

(*v*) *Steinkeller* v. *Newton*, (1838) 9 C. & P. 315; 9 L. J. C. P. 262.

(*x*) *Anon.*, (1753) 1 Lew. 101, cited by Ld. Kenyon in *Doe* v. *Perkins*, (1790) 3 T. R. 752—754. See *Sayer* v. *Wagstaff*, (1842) 5 Beav. 462; 13 L. J. Ch. 161; 14 L. J. Ch. 116; 59 R. R. 546.

(*y*) The law on this subject is thus laid down in section 159 of the Indian Evid. Act of 1872 :—"Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of such document: provided the court be satisfied that there is sufficient reason for the non-production of the original."

(*z*) *Tanner* v. *Taylor*, (1756) cited per Buller, J., in *Doe* v. *Perkins*, (1790) 3 T. R. 754, as decided by Legge, B.; *Anon.*, (1827) per Bayley, J., 1 Lewin C. C. 101; *Duch. of Kingston's Case*, (1776) 20 How. St. Tr. 619; *R.* v. *Hedges*, (1767) 28 How. St. Tr. 1367.

(*a*) *Ld. Talbot* v. *Cusack*, (1864) 17 Ir. C. L. R. 213.

(*b*) *Burton* v. *Plummer*, (1834) 2 A. & E. 344; 4 L. J. K. B. 53; 41 R. R. 450. See, also, *Jones* v. *Stroud*, (1825) 2 C. & P. 196; 31 R. R. 660.

§ 1409. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness have no independent recollection of the facts narrated therein, the original must be used (*c*).

§ 1410. Before a witness can refresh his memory by looking at memoranda, it seems to be further necessary that they should have been made, either by the witness himself, or by some person in his presence (*d*), or, at least, that he should have examined them while the facts were fresh in his memory, and should then have known that the particulars therein mentioned were correctly stated (*e*). In accordance with the last part of this rule, a witness has been allowed to refer to a log-book, which, though not written by himself, had, from time to time, and while the occurrences were recent, been examined by him (*f*); and the same course has been pursued with respect to a workman's time-book, which the pay-clerk had acted upon in paying the weekly wages (*g*). So, where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions, taken shortly after the bankruptcy, though such depositions were of course not written by themselves, but merely signed by them (*h*). So, where a witness called on behalf of a prosecution makes a statement in his examination in chief inconsistent with what he has previously sworn

(*c*) *Doe* v. *Perkins*, (1790) 3 T. R. 749; explained by Patteson, J., in *R.* v. *St. Martin's, Leicester*, (1834) 2 A. & E. 215; *R.* v. *Hedges*, (1767) 28 How. St. Tr. 1367; *Solomons* v. *Campbell*, (1822) cited 1 St. Ev. 177, 178, n., per Abbott, C. J.; *Beech* v. *Jones*, (1848) 5 C. B. 696; *Alcock* v. *Royal Exchange Insurance Co.*, (1849) 13 Q. B. 292. The case of *Burton* v. *Plummer*, (1834) 2 A. & E. 341, in no way contravenes this rule. There, the plaintiff's clerk, being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a ledger. The transactions in trade had been noted by the clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the time checked by the clerk. Under these circumstances, the court very properly regarded the ledger as an original, and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne* v. *Mackenzie*, (1839) 6 Cl. & F. 628; where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers, and compiled from his original notes, of which it was substantially, though not verbally, a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid. See, also, *Topham* v. *Macgregor*, (1844) 1 Car. & K. 320; 70 R. R. 797; where the writer of an article in a newspaper was allowed to refresh his memory by the paper, his MS. being proved to be lost. See *Ld. Talbot* v. *Cusack*, (1864) 17 Ir. C. L. R. 213.

(*d*) *Duch. of Kingston's Case*, (1776) 20 How. St. Tr. 619.

(*e*) See *ante*, § 1406, note.

(*f*) *Burrough* v. *Martin*, (1809) 2 Camp. 112; 11 R. R. 679; *Anderson* v. *Whalley*, (1852) 3 Car. & K. 54.

(*g*) *R.* v. *Langton*, (1877) 46 L. J. M. C. 136; 2 Q. B. D. 296.

(*h*) *Smith* v. *Morgan*, (1839) 2 M. & Rob. 257; *Wood* v. *Cooper*, (1845) 1 Car. & K. 645; *Vaughan* v. *Martin*, (1796) 1 Esp. 440.

before the magistrates, or the coroner, the counsel for the Crown may show him his deposition, for the purpose of refreshing his memory, and may then repeat the question in a leading form (*i*). Again, if the witness has checked an entry made by another person (*k*); or has actually seen money paid and a receipt given (*l*); or has read a memorandum to a party who had assented to its terms (*m*); in all these, and the like cases, he will be allowed to look at the document itself, for the purpose of refreshing his memory as to the facts mentioned therein. In one or two cases a greater latitude is said to have prevailed; and witnesses are reported to have been allowed to refresh their memories from the brief notes of counsel taken at a former trial, provided they could afterwards speak from recollection, and not merely from the notes (*n*). These cases, however, can scarcely be regarded as authorities, and are certainly opposed in spirit to a decision of Lord Tenterden's (*o*), where a witness, having denied on cross-examination that he was ever sentenced to imprisonment, was not permitted under the old law to have his memory refreshed by a copy of his conviction (*p*). If the witness has become blind, the paper may be read over to him, for the purpose of exciting his recollection (*q*).

§ 1411. As a writing, used to refresh the memory, does not thereby become evidence of itself (*r*), it is not necessary that it should even be admissible; and therefore a receipt which cannot be read for want of a stamp, may yet be referred to by the witness in giving his evidence (*s*). Accordingly, in an action for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant, and expressed to be given for money lent was put into defendant's hands by plaintiffs' counsel for the purpose of refreshing his memory, and obtaining from him an admission of the loan, and it was held

(*i*) *R.* v. *Williams*, (1853) 6 Cox, C. C. 343; 20 L. J. M. C. 106. But counsel for the defence, in cross-examining a witness, may not place his deposition in his hand to refresh his memory without putting it in evidence: *R.* v. *Ford*, (1851) 5 Cox, 184; 20 L. J. M. C. 171.

(*k*) *Burton* v. *Plummer*, *supra*.

(*l*) *Rambert* v. *Cohen*, (1803) 4 Esp. 213; 6 R. R. 854.

(*m*) *Bolton, Ld.* v. *Tomlin*, (1836) 5 A. & E. 856; 6 L. J. K. B. 45; 44 R. R. 612; *Jacob* v. *Lindsay*, (1801) 1 East, 459; *R.* v. *St. Martin's, Leicester*, (1834) 2 A. & E. 210.

(*n*) *Lawes* v. *Reed*, (1835) 2 Lewin C. C. 152, per Alderson, B., citing *Balme* v. *Hutton*, as a similar case. See, also, *Henry* v. *Lee*, (1814) 2 Chit. 124.

(*o*) *Meagoe* v. *Simmons*, (1827) 3 C. & P. 75.

(*p*) See now 28 & 29 V. c. 18, s. 6, cited *post*, § 1437.

(*q*) *Catt* v. *Howard*, 3 Stark. R. 3; *Vaughan* v. *Martin*, *supra*.

(*r*) *Alcock* v. *Royal Exchange Insurance Co.*, (1849) 13 Q. B. 292; 18 L. J. Q. B. 121; 78 R. R. 364; *Payne* v. *Ibbotson*, (1858) 27 L. J. Ex. 341; 114 R. R. 1048.

(*s*) *Maugham* v. *Hubbard*, (1828) 8 B. & C. 14; 6 L. J. (O.S.) K. B. 229; 32 R. R. 328; *Jacob* v. *Lindsay*, *supra*; *Rambert* v. *Cohen*, *supra*; *Catt* v. *Howard*, (1820) 3 Stark. 3; 23 R. R. 751.

that plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act, 1891 (*t*), that "an instrument not duly stamped shall not be given in evidence or available for any purpose whatever" (*u*). Neither is it essential that notes used by a witness, who is called to prove a conversation, a speech, or the like, should contain a verbatim account of all that was uttered. Thus, where it appeared that a shorthand writer had taken a verbatim note of such parts of an address as he deemed material, and was merely able to swear to the substantial correctness of the remainder, he was permitted to read the whole; though it was strongly urged that, as by the witness's own showing the note was a partial one, the fulness and consequent accuracy of which rested on his private opinion of the materiality of what was spoken, he was not entitled to use it at all, but was bound to depend on his memory alone (*v*).

§ 1412. In order that a document may be used as the refresher of memory, it is by no means necessary that the witness, after having seen it, should have any independent recollection of the facts mentioned therein, or connected therewith; but it will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct; or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question. Thus, where an agent, who had made a parol lease, and entered a memorandum of the terms in a book, stated that he had no memory of the transaction but from the book, though on reading the entry he entertained no doubt that the fact really happened, it was held sufficient (*x*); and a barrister, called to prove that a witness had materially varied his account since the last trial, has been allowed to refresh his memory by the notes on his brief, though he had no independent recollection of what took place on the former occasion (*y*). Another example (*z*) of this kind, is where a banker's clerk is shown a bill of exchange, which has his own writing upon it, from which he knows and is able to swear positively that it has passed through his hands. So, where a witness, from seeing his own signature to the attestation of a deed, says that

(*t*) 54 & 55 V. c. 39, s. 14 (4).

(*u*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325; 65 L. J. Q. B. 252.

(*v*) *R.* v. *O'Connell*, (1843) Arm. & T. 165—167.

(*x*) *R.* v. *St. Martin's, Leicester*, (1834) 2 A. & E. 210. See, also, *Haig* v. *Newton*, (1817) 1 Mill. R. 423; *Sharpe* v. *Bingley*, (1817) *id.* 343; *Maugham* v. *Hubbard*, *supra*.

(*y*) *R.* v. *Guinea*, (1841) Ir. Cir. R. 167, per Crampton, J.

(*z*) Gr. Ev. § 437, in great part, for seven lines.

he is therefore sure that he saw the party execute it, this is sufficient proof of the execution, though he adds that he has no recollection of the fact (*a*).

§ 1413. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable (*b*)—and if the witness has no independent recollection of the fact, it is necessary—that they should be produced at the trial (*c*), and that the opposite counsel should have an opportunity of inspecting them, in order that on cross- or re-examination, he may have the benefit of the witness's refreshing his memory by every part (*d*). Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to (*e*); but if he goes further than this, and asks questions as to other parts of the memorandum, it seems that he thereby makes it his own evidence (*f*). If a paper be put into the hand of a witness, merely to prove handwriting, and not refresh his memory (*g*), or if being given to the witness for

(*a*) *Maugham* v. *Hubbard*, *supra*; *R.* v. *St. Martin's*, *Leicester*, *supra*; *Russell* v. *Coffin*, (1829) 8 Pick. 143, 150; *Jackson* v. *Christman*, (1830) 4 Wend. 277, 282; *Pigott* v. *Holloway*, (1808) 1 Binn. 436; *Smith* v. *Lane*, (1824) 12 Serg. & R. 84; *Clark* v. *Vorce*, (1836) 15 Wend. 193.

(*b*) *R.* v. *Hardy*, (1794) 24 How. St. Tr. 824. But it does not appear to be strictly necessary: *Kensington* v. *Inglis*, (1807) 8 East, 273; 9 R. R. 438; *Burton* v. *Plummer*, (1834) 2 A. & E. 341; 4 L. J. K. B. 53; 41 R. R. 450.

(*c*) *Beech* v. *Jones*, (1848) 5 C. B. 696.

(*d*) *Howard* v. *Canfield*, (1836) 5 Dowl. 417; 49 R. R. 716; *R.* v. *St. Martin's*, *Leicester*, *supra*; *Sinclair* v. *Stevenson*, (1824) 1 C. & P. 583; 3 L. J. C. P. 61; *Loyd* v. *Freshfield*, (1826) 2 C. & P. 332; *Dupuy* v. *Truman*, (1843) 2 Y. & C. C. C. 341 *Lord* v. *Colvin*, (1854) 2 Drew. 205; 23 L. J. Ch. 469; 100 R. R. 85.

(*e*) *R.* v. *Ramsden*, (1827) 2 C. & P. 604; 31 R. R. 703; *Gregory* v. *Tavernor*, (1833) 6 C. & P. 281; *Payne* v. *Ibbotson*, (1858) 27 L. J. Ex. 341; 114 R. R. 1048.

(*f*) *Gregory* v. *Tavernor*, *supra*. See *Stephens* v. *Foster*, (1833) 6 C. & P. 289.

(*g*) *Russell* v. *Rider*, (1834) 6 C. & P. 416; *Sinclair* v. *Stevenson*, (1824) 1 C. & P. 583; 3 L. J. C. P. 61; *Lord* v. *Colvin*, (1854) *supra*. In Scotland the subject of the use and proper office of writings, in restoring the recollection of witnesses, is stated with precision by Alison, in his Treatise on the Practice of the Criminal Law. "It is frequently made a question," he observes, "whether a witness may refer to notes or memoranda made to assist his memory. On this subject, the rule is, that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up at the distance of weeks or months thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow a witness to look to memoranda made at the time, of dates, distances, appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony, or even to read such notes to the jury as his evidence, he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition, signed by him, and libelled on as a production at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial, and much more correctness and accuracy is obtained than could possibly have been expected, if the witness were required to state from memory all the particulars of the stolen articles, at the distance perhaps of months from the time when

the purpose of refreshing his memory, the questions founded upon it utterly fail, the opposite party is not entitled to see it (*h*). If he does look at it under these circumstances, he may be required by his adversary to put it in evidence (*i*).

§ 1414. Unless evidence of reputation be admissible (*k*), witnesses must, in general, merely speak to facts within their own knowledge; and they will not be permitted—excepting under the circumstances that will presently be mentioned (*l*)—to express their own belief or opinion. For instance, where goods had been supplied to a firm, and the question raised between the parties was, whether the defendant had held himself out to the plaintiff as the only person composing the firm, a witness, who proved the giving of the order by the defendant, was not allowed to be asked with whom he dealt, because such a question was only a skilful mode of ascertaining the witness's opinion, which might be founded on hearsay evidence; and the court held, that

they were lost. With the exception, however, of such memoranda, notes, or inventories, made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *viva voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule; in the case of medical or other scientific reports or certificates, which are lodged in process before the trial, and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath, that it is a true report. The reason of this exception is founded in the consideration, that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed that they cannot with safety be intrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and from their situation and rank in life, are much less liable to suspicion than those of an inferior class, or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subject to a further examination by the prosecutor, or a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions heard by him from the panel, or the like, utitur jure communi, he stands in the situation of an ordinary witness, and must give his evidence verbally in answer to the questions put to him, and can only refer to jottings or memoranda of dates, &c., made up at the time to refresh his memory, like any other person put into the box."

(*h*) *R.* v. *Duncombe*, (1835) 8 C. & P. 369; *Lord* v. *Colvin*, (1854) 23 L. J. Ch. 469; 5 De G. M. & G. 47; 100 R. R. 85. In *Holland* v. *Reeves*, (1835) 7 C. & P. 39, a party put a document into the hands of an adverse witness, and cross-examined him upon it, whereupon he was required by the opposite counsel to have it read forthwith; but Alderson, B., held that the cross-examining party was not bound to put in the document, until he had opened his own case. It would seem, however, in such a case, that the opposite counsel would have a right to inspect the document, in order to found questions upon it in re-examination. See *post*, §§ 1446—1452.

(*i*) *Palmer* v. *Maclear*, (1858) 1 Sw. & Tr. 149.

(*k*) *Ante*, § 607.

(*l*) *Post*, §§ 1416—1425.

the only proper inquiry was as to the acts done (*m*). So, in an action of slander, if the words used are alleged to have been spoken in a sense different from their ordinary meaning, a by-stander cannot be asked, in the first instance, what he understood by them (*n*), but the proper course will be to ask the witness whether there was anything to prevent the words from conveying the meaning which they ordinarily would convey to him; and then, if he states any facts which lead to the inference that they were used in a peculiar sense, a foundation will have been laid for the question, "What did you understand by those words (*o*)?"

§ 1415 (*p*). But, though a witness, in general, must depose to such facts only as are within his own knowledge (*q*), the law does not require him to speak with such expression of certainty as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge of the weight of his testimony (*r*). But if the impression on his mind be so slight as to justify the belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected (*s*).

§ 1416 (*t*). On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his belief, is equally liable to be convicted of perjury, with the man who swears positively to a fact which he knows to be untrue (*u*). The only difference is, that proof of the commission of the crime is more difficult in the one case than in the other. In conformity with this rule, which admits evidence of opinion on the ground of necessity, witnesses are constantly permitted to express their belief respecting the identity of

(*m*) *Bonfield* v. *Smith*, (1844) 12 M. & W. 405; 13 L. J. Ex. 105.

(*n*) *D. of Brunswick* v. *Harmer*, (1850) 3 C. & Kir. 10; 19 L. J. Q. B. 20; 80 R. R. 241.

(*o*) *Daines* v. *Hartley*, (1848) 3 Ex. 200; 18 L. J. Ex. 81; 77 R. R. 600. See *Simmons* v. *Mitchell*, (1881) 6 App. Cas. 156; 50 L. J. P. C. 11.

(*p*) Gr. Ev. § 440, in part.

(*q*) As to evidence of reputation, see *ante*, § 607.

(*r*) *Miller's Case*, (1773) 3 Wils. 427; *Carmalt* v. *Post*, (1837) 8 Watts, 411; *R.* v. *Stafford*, (1680) 7 How. St. Tr. 1378.

(*s*) *Clark* v. *Bigelow*, (1839) 4 Shepl. 246.

(*t*) Gr. Ev. § 440, in part.

(*u*) *R.* v. *Pedley*, (1784) 1 Lea. 327; *Miller's Case*, (1773) 2 W. Bl. 885, 886, per De Grey, C.J.; *Folkes* v. *Chadd*, (1782) 3 Doug. 159; *R.* v. *Schlesinger*, (1847) 10 Q. B. 670; 14 L. J. M. C. 29.

persons and things, as also respecting the genuineness of disputed handwriting (*v*). So, where the question was whether a house agent was entitled to his commission, as on the sale of a house through his intervention, the purchaser was allowed to be asked whether he thought he should have bought the property if he had not obtained a card to view it from the agent's office (*x*). So, in a petition for damages on the ground of adultery (*y*), or in an action for breach of promise of marriage, any person who has been in a position to observe the mutual deportment of the parties, may give in evidence his opinion upon the question, whether or not they were attached to each other (*z*). In America it has been determined, upon grave consideration, and in conformity with the doctrine which has always prevailed in our ecclesiastical courts (*a*), that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose, not only to particular facts, but to his opinion or belief as to the sanity of the party, formed from such actual observation (*b*). So, also, in that country, the subscribing witnesses to a will may testify their opinions, with respect to the sanity of the testator at the time of executing the will; for the law has placed them about the testator, to ascertain and judge of his capacity (*c*).

§ 1417 (*d*). This mode of examination, however, chiefly prevails on questions of *science or trade*, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts* (*e*), are allowed, not only to testify to facts, but to give their opinions in evidence. Thus, the opinions of

(*v*) As to proof of handwriting, see *post*, § 1862, *et seq.*; *Folkes* v. *Chadd*, *supra*.

(*x*) *Mansell* v. *Clements*, (1874) L. R. 9 C. P. 139.

(*y*) See 20 & 21 V. c. 85, s. 33.

(*z*) *Trelawney* v. *Colman*, (1817) 2 Stark. 192; 18 R. R. 438; *M'Kee* v. *Nelson*, (1825) 4 Cowen, 355.

(*a*) *Wheeler* v. *Alderson*, (1831) 3 Hag. Ecc. 574, 604, 605.

(*b*) *Clary* v. *Clary*, (1841) 2 Iredell, 78 (Am.).

(*c*) *Chase* v. *Lincoln*, (1807) 3 Mass. 237; *Poole* v. *Richardson*, (1807) *id.* 330; *Rambler* v. *Tyron*, (1821) 7 Serg. & R. 90, 92; *Buckminster* v. *Perry*, (1808) 4 Mass. 590; *Grant* v. *Thompson*, (1822) 4 Conn. 203; *Wogan* v. *Small*, (1824) 11 Serg. & R. 141.

(*d*) Gr. Ev. § 440, in part.

(*e*) Substantially, the above description represents the definition of an "expert" given in notes to *Carter* v. *Boehm*, (1766) contained in 1 Smith's Leading Cases. One who has studied a subject carefully falls within this definition, though he has never practised it: Greenleaf on Evidence (15th ed.), notes (*r*) and (*d*), on p. 577. The question whether a person is an expert or not is usually one for the decision of the judge: *id.*, note (*b*). As to what matters are properly the subject of expert evidence, see text, and also Greenleaf, p. 578. An expert may be cross-examined as to statements in scientific treatises with regard to the subjects as to which he is giving evidence: see *Darby* v. *Ouseley*, (1856) 1 H. & N. 1; 25 L. J. Ex. 227; 108 R. R. 419. In *Crosfield* v. *Techno-Chemical Laboratories*, (1913) 29 Times R. 378, Neville, J., discussed the functions of the expert witness.

medical men are constantly admitted, as to the cause of disease or death (*f*), or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill (*g*). So, persons who have made the peculiarities of handwriting their special study, have been examined to their belief, as to whether the writing of an instrument was in a feigned hand, and also as to whether two documents, supposed to have been written in a disguised hand, were written by the same person (*h*). So, antiquaries have been called to fix, by conjecture, the date of ancient handwriting (*i*); and practical surveyors may express their opinions, whether certain marks on trees, piles of stone, &c., were intended as monuments of boundaries (*k*). So, an accountant, who, although not an actuary, was acquainted with the business of life insurance, has been allowed to give evidence as to the average and probable duration of lives, and the value of annuities (*l*). So, a secretary of a fire insurance company, accustomed to examine buildings with reference to the insurance of them, and who, as a county commissioner, had frequently estimated damages occasioned by the laying out of railroads and highways, has been held competent to testify his opinion, as to the effect of laying a railroad within a certain distance of a building, upon the value of the rent, and the increase of the rate of insurance against fire (*m*). So, where the question was, whether a paper had contained certain pencil-marks, which were alleged to have been rubbed out, the opinion of an engraver, who had examined the paper with a mirror, was held to be admissible evidence, *valeat quantum* (*n*). Seal-engravers also may be called to give their opinions upon an impression, whether it was made from an original seal, or from another impression (*o*). So, the opinion of an artist in painting is evidence respecting the genuineness of a picture (*p*). And it seems that a post-

(*f*) *R.* v. *Mason*, (1911) 28 Times R. 120.

(*g*) 1 St. Ev. 175; Tait, Ev. 433; *R.* v. *Wright*, (1821) R. & R. 456; *Hathorn* v. *King*, (1811) 8 Mass. 371; *Collett* v. *Collett*, (1838) 1 Curt. 687.

(*h*) *Goodtitle* v. *Braham*, (1792) 4 T. R. 497.

(*i*) *Tracy Peer.*, (1843) 10 Cl. & F. 191; 59 R. R. 59.

(*k*) *Davis* v. *Mason*, (1826) 4 Pick. 156.

(*l*) *Rowley* v. *Lond. and N. W. Ry.*, (1873) L. R. 8 Ex. 221; 42 L. J. Ex. 153.

(*m*) *Webber* v. *Eastern Ry.*, (1840) 2 Metc. 147. Where a point, involving questions of practical science, is in dispute before a court unaided by a jury or assessors, the court will advise a reference to an expert in that science for his opinion on the facts; and the report of such party will be adopted by the court: *Webb* v. *Manchester and Leeds Ry.*, (1839) 4 Myl. & Cr. 120, 121; 48 R. R. 28; 1 Rail. Cas. 576, S. C. There is now in the High Court a power to refer such a case compulsorily: R. S. C. Ord. XXXVI. r. 5. In the County Court, a matter can only be referred by consent: 51 & 52 V. c. 43, s. 104.

(*n*) *R.* v. *Williams*, (1838) 8 C. & P. 434, per Parke, B., and Tindal, C.J.

(*o*) Per Ld. Mansfield, in *Folkes* v. *Chadd*, (1782) 3 Doug. 157.

(*p*) In *Belt* v. *Lawes*, tried by Huddleston, B., in 1883, many R.A.'s were called who expressed decided opinions hostile to the plaintiff's artistic claims.

mark may be proved by the opinion of a clerk of the post-office, or, perhaps, of any one who has been in the habit of receiving letters with that mark (*q*).

§ 1418 (*r*). Where the question was whether a bank, which had been erected to prevent the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific engineers, as to the effect of such an embankment upon the harbour, were held to be admissible evidence (*s*). So, naturalists, who have observed the habits of certain fish, have been permitted to state their opinions, as to the ability of the fish to overcome particular obstructions in the rivers which they are accustomed to ascend (*t*). So, in the case of *Bradley* v. *Arthur* (*u*), the opinion of experienced officers was taken respecting a question of military practice, and the court held that such evidence was clearly admissible, though the Lord Chief Justice was unwilling to attach to it any great weight. In short, it may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance (*v*); in other words, when it so far partakes of the character of a science or art, as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature (*x*).

§ 1419. On the other hand, it seems equally clear, that the opinions of skilled witnesses cannot be received, when the inquiry relates to a subject, which does not require any peculiar habits or course of study in order to qualify a man to understand it (*y*). Thus, evidence is inadmissible to prove that one name (*z*), or one trade mark (*a*), so nearly resembles another as to be calculated to deceive, or that the make up of one tin of coffee is so like another as to be calculated to deceive purchasers (*b*). So, also (*c*), witnesses are not

(*q*) *Abbey* v. *Lill*, (1829) 5 Bing. 299, 304; 7 L. J. C. P. 96; *Fletcher* v. *Braddyll*, (1821) 3 Stark. 64; 23 R. R. 758; *Woodcock* v. *Houldsworth*, (1846) 16 M. & W. 124; 16 L. J. Ex. 49.

(*r*) Gr. Ev. § 440, in part.

(*s*) *Folkes* v. *Chadd*, (1782) 3 Doug. 157.

(*t*) *Cottrill* v. *Myrick*, (1835) 3 Fairf. 222 (Am.).

(*u*) (1825) 4 B. & C. 295, 305, 307, 311. See also *Barwis* v. *Keppel*, (1766) 2 Wils. 314.

(*v*) *M'Fadden* v. *Murdock*, (1867) 1. R., 1 C. L. 211.

(*x*) 1 Smith, L. C., notes to *Carter* v. *Boehm*.

(*y*) *Id.*

(*z*) *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83; 68 L. J. Ch. 74.

(*a*) *Bourne* v. *Swan & Edgar*, [1903] 1 Ch. 211; 72 L. J. Ch. 168.

(*b*) *Payton & Co.* v. *Snelling, Lampard & Co.*, [1901] A. C. 308; 70 L. J. Ch. 644. The case of *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135; 70 L. J. Ch. 17; appears to be in conflict with the principle here laid down and with the last three

permitted to state their views on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced, had the parties acted in one way rather than another (*d*). Thus, the opinions of medical practitioners upon the question, whether a certain physician had honourably and faithfully discharged his duty to his medical brethren, have been rejected; because, on such a point, the jury were as capable of forming an opinion as the witnesses themselves (*e*). To put it briefly, a witness may not, on other than scientific subjects be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is *careful*; a road *dangerous*; or an assault or homicide *justifiable* (*f*). Nor may he be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is a question for the judge (*g*).

§ 1420. In some cases, it may be difficult to determine whether the particular question be one of a scientific nature or not, and, consequently, whether skilled witnesses may or may not pass their opinions upon it. In *Greville* v. *Chapman* (*h*), which was an action for a libel, imputing to the plaintiff dishonourable conduct in withdrawing a horse which had been entered for a race, and against which he had betted, a witness for the plaintiff on cross-examination stated, that by the rules of the Jockey Club a man might bet against his own horse, and then withdraw him without assigning any reason, and that, in such a case, he would be entitled to receive the amount of the wager. On re-examination, he was asked his opinion respecting the morality of such conduct, and the court held that this question might properly be put with the view of arriving at the real meaning of the rules. For many years it was a vexed question whether in actions upon policies of assurance where the question was whether there had been non-disclosure of material facts, and in actions against insurance brokers for negligence, in not drawing, or in not altering, a policy according to instructions, other brokers could be called to state their opinions as to what the conduct of persons similarly situated ought to have been? To these queries, formerly, no satisfactory answer

cited cases. In that case the C. A. appear to have held that the judge of first instance was wrong in deciding, upon a view only, that the get-up of two omnibuses was "calculated to deceive." See the remarks of Farwell, J., on this case in *Bourne* v. *Swan & Edgar*, *supra*.

(*c*) Gr. Ev. § 441, in part.

(*d*) *Campbell* v. *Rickards*, (1833) 5 B. & Ad. 846; 2 L. J. K. B. 204; 39 R. R. 679, per Ld. Denman.

(*e*) *Ramadge* v. *Ryan*, (1832) 9 Bing. 333; 2 L. J. C. P. 7; 35 R. R. 540.

(*f*) See Greenleaf on Evidence (15th ed.), § 441, and American cases there cited.

(*g*) *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L. J. Ch. 419; *Dowden* v. *Pook*, [1904] 1 K. B. 45; 73 L. J. K. B. 38.

(*h*) (1844) 5 Q. B. 731. It is not probable that the courts would sanction any extension of the doctrine here propounded.

could be given, as the Court of King's Bench had held that such evidence could not be received, while the Court of Common Pleas had determined that it could. But for many years past it has been the practice to admit such evidence, and its admissibility must now be taken to be established (*i*). In actions upon policies of life assurance the evidence of medical men is admissible upon the materiality of illnesses from which the assured has suffered (*k*).

§ 1421. The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* at the trial (*l*). But here the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine. For instance, if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts (*m*). Where, indeed, the facts are admitted, or not disputed, and the question thus becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though it cannot be insisted on as a matter of right (*n*). The proper and usual form of question is to ask him whether, *assuming* such and such facts, the prisoner was sane or insane? The jury are then left to say whether the assumed facts exist or not (*o*). So, in an action for unskilfully navigating a ship, though a Master of the Trinity House, or other nautical witness, cannot in strictness be asked whether, after having heard the evidence, he thinks the ship was properly or improperly navigated;—for, in answering such a question, the witness would have to draw a conclusion of fact, as well

(*i*) *Ionides* v. *Pender*, (1874) L. R. 9 Q. B. 531; 43 L. J. Q. B. 227; *Herring* v. *Ianson*, (1895) 1 Com. Cas. 177; *Scottish Shire Line* v. *London, &c., Co.*, [1912] 3 K. B. 51, at p. 70; 81 L. J. K. B. 1066, per Hamilton, J.; *Yorke* v. *Yorkshire Insurance Co.*, [1918] 1 K. B. 662, at p. 670; 87 L. J. K. B. 881. A summary of the authorities upon the subject, English and American, will be found in 1 Sm. L. C. (12th ed.), p. 576; Arnould on Marine Insurance, § 626, and in the last edition of this work in notes to § 1420.

(*k*) *Yorke* v. *Yorkshire Insurance Co.*, *supra*.

(*l*) *R.* v. *Wright*, (1821) R. & R. 456; *R.* v. *Searle*, (1831) 1 M. & Rob. 75; *Fenwick* v. *Bell*, (1844) 1 Car. & K. 312; 70 R. R. 796; *Beckwith* v. *Sydebotham*, (1807) 1 Camp. 117; 10 R. R. 652; *Collett* v. *Collett*, (1838) 1 Curt. 687.

(*m*) *M'Naghten's Case*, (1843) 10 Cl. & F. 200, 211, 212; 59 R. R. 85.

(*n*) *Id.*

(*o*) *R.* v. *Wright*, (1821) R. & R. 456.

as to give his opinion upon it (*p*);—yet he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true (*q*). So, upon a question of seaworthiness, experienced shipwrights have frequently been called to give an opinion as to whether a ship in a state in which the one in question was sworn to be on a certain day of the voyage, could have been seaworthy when the policy was effected (*r*).

§ 1422. It would seem, that in all cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises (*s*), tables, calculations, lists of prices and the like. For instance, an actuary might refer to "the Carlisle Tables," when called upon to give evidence respecting the value of an annuity on joint lives (*t*); and an architect might, it is presumed, refresh his memory with any price list of generally acknowledged correctness. So, although medical books are not directly admissible in evidence (*u*), no good reason can be given, why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority; or why he should not be asked, after such a reference, whether his judgment was or was not thereby confirmed. It does not, however, appear, that this course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and he has also been permitted, while explaining the grounds of his opinion, to state that his judgment was founded in part on the writings of his professional brethren (*v*).

§ 1423. In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, and of the usages and customs of *Foreign States*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject (*x*). Thus, in the great case of *Dalrymple* v.

(*p*) *Sills* v. *Brown*, (1840) 9 C. & P. 60. See also *Jameson* v. *Drinkald*, (1826) 12 Moore, 148; 5 L. J. (O.S.) C. P. 30.

(*q*) *Fenwick* v. *Bell*, *supra*; *Malton* v. *Nesbit*, (1824) 1 C. & P. 72. In appeals under the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), ss. 475, 479, the court, being advised by nautical assessors, will not permit experts to be called to give evidence on questions of nautical knowledge or skill: *The Kestrel*, (1881) 6 P. D. 182.

(*r*) *Beckwith* v. *Sydebotham*, *supra*; *Thornton* v. *Royal Exchange Assurance Co.*, (1791) Pea. 25.

(*s*) See post, § 1423, *ad fin.* The Ind. Ev. Act, 1872, s. 159, is as follows:—"An expert may refresh his memory by reference to professional treatises."

(*t*) *Rowley* v. *L. and N. W. Ry.*, (1873) L. R. 8 Ex. 221; 42 L. J., Ex. 153.

(*u*) *Collier* v. *Simpson*, (1831) 5 C. & P. 74; 38 R. R. 796, per Tindal, C.J.

(*v*) *Id.* 73.

(*x*) See *ante*, §§ 5, 9, 48.

Dalrymple (*y*), where the point for the decision of the court turned on the state of the Scotch Marriage Law, the depositions of eminent Scottish lawyers were given in evidence, and carefully sifted and compared by Sir William Scott in his judgment. It seems to have been thought at one time, that all foreign *written* law must be proved by a copy properly authenticated (*z*); but this doctrine is now distinctly exploded (*a*); the House of Lords having determined (*b*),—in accordance with a decision of the Court of Queen's Bench (*c*),—that whenever foreign written law is to be proved, that proof cannot be taken from the book of the law, but must be derived from some skilled witness who describes the law. For instance, if any question were to arise in a British court of justice respecting the existence or meaning of a French law, it would not suffice to produce the Code Napoléon, because the court would not have organs to deal with and construe its provisions; but the assistance of foreign lawyers, who knew how to interpret it, must of necessity be prayed in aid (*d*). Still, the witness may refresh and confirm his recollection of the law, or assist his own knowledge, by referring to text-books, decisions, statutes, codes, or other legal documents, or authorities; and if he describes these works as truly stating the law, they may be read, not as evidence per se, but as part and parcel of his testimony (*e*). When an expert,

(*y*) (1811) 2 Hag. Con. 54. See also *R.* v. *Povey*, (1853) Dears. 32; 22 L. J. M. C. 19.

(*z*) *R.* v. *Picton*, (1806) 30 How. St. Tr. 491; *Clegg* v. *Levy*, (1812) 3 Camp. 166; *Millar* v. *Heinrick*, (1815) 4 Camp. 155; *Freemoult* v. *Dedire*, (1718) 1 P. Wms. 431; *Boehtlinck* v. *Schneider*, (1799) 3 Esp. 58.

(*a*) Ld. Brougham, in his sketch of Ld. Stowell, thus explains the duty of a judge in dealing with questions of foreign law:—"It is possibly hypercritical to remark one inaccurate view which pervades a portion of this judgment [in *Dalrymple* v. *Dalrymple*]. Although the Scottish law was of course only matter of evidence before Sir W. Scott, and as such for the most part dealt with by him, he yet allowed himself to examine the writings of commentators, and to deal with them as if he were a Scottish lawyer. Now, strictly speaking, he could not look at those text-writers, nor even at the decisions of judges, except only so far as they had been referred to by the witnesses, the skilful persons, the Scottish lawyers, whose testimony alone he was entitled to consider. For *they* alone could deal with either dicta of text-writers or decisions of courts. He had no means of approaching such things, nor could avoid falling into errors when he endeavoured to understand their meaning, and still more when he attempted to weigh them and to compare them together. This at least is the strict view of the matter, and in many cases the fact would bear it out. Thus we constantly see gross errors committed by Scottish and French lawyers of eminence, when they think they can apply an English authority. But in the case to which we are referring, the learned judge certainly dealt as happily, and as safely, and as successfully, with the authorities, as with the conflicting testimonies which it was his more proper province to sift and to compare." Statesmen of the Time of G. 3, 2nd Ser. 76.

(*b*) *Sussex Peer.*, (1844) 11 Cl. & F. 85, 114—117; 65 R. R. 11.

(*c*) *Baron de Bode's Case*, (1845) 8 Q. B. 208, 250—267; 70 R. R. 448.

(*d*) *Sussex Peer.*, *supra*. See also *Ld. Nelson* v. *Ld. Bridport*, (1846) 8 Beav. 527; 68 R. R. 174, where this subject is very ably treated by Ld. Langdale, M.R. See, too, *Cocks* v. *Purday*, (1846) 2 Car. & K. 269; and *Bremer* v. *Freeman*, (1857) 10 Moore P. C. 306; 110 R. R. 38.

(*e*) *Sussex Peerage Case*, *supra*; *Ld. Nelson* v. *Ld. Bridport*, *supra*.

however, vouches a foreign code, an English court may construe it for itself (*f*).

§ 1424. The principles which should govern our courts in the construction of foreign documents were much discussed in the case of the *Duchess di Sora* v. *Phillipps* (*g*). The question there turned on the meaning of a preliminary marriage contract which had been drawn up in the Italian language and executed at Rome; and the House of Lords held that, before the judge could discover and declare that meaning, he should obtain, through the medium of skilled witnesses, first, a translation of the document; secondly, an explanation of any terms of art used in it; and thirdly, information on any special law, or on any peculiar rule of construction, of the foreign State affecting it. Aided by these lights, the court would then proceed to put a judicial construction upon the instrument.

§ 1425. In order to render a witness competent to give evidence on a point of foreign law, he must, in general (*h*), either be a *professional man* belonging to the country whose laws are in question, or at least he must hold *some official situation*, which presumes, because it requires, sufficient knowledge (*i*). Thus, a judge, an advocate, a barrister, or a solicitor, will be an admissible witness to prove the laws of his own country; and an attorney-general, though not a barrister, as is occasionally the case in some of our colonies, may be examined as a person *peritus virtute officii* (*k*). So, a Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, has, in virtue of that office, been considered as a person skilled in the matrimonial law of Rome, and therefore an admissible witness to prove that law (*l*). But on an indictment for bigamy, where the first marriage ceremony had been performed in Scotland by a Roman Catholic priest, such priest was not allowed to give evidence respecting the Scottish law of marriage (*m*). Whether a

(*f*) *Concha* v. *Murrietta*, (1889) 40 Ch. D. 543; *Bremer* v. *Freeman*, *supra*.

(*g*) (1864) 10 H. L. C. 624; 33 L. J. Ch. 129; 138 R. R. 337. See *Stearine, &c., Co.* v. *Heintzmann*, (1864) 17 C. B. (N.S.) 60; 142 R. R. 245.

(*h*) See, however, *Wilson* v. *Wilson*, [1903] P. 157; 72 L. J. P. 53.

(*i*) *Sussex Peer.*, *supra*.

(*k*) *Id.* 124, per Ld. Brougham; *R.* v. *Picton*, (1806) 40 How. St. Tr. 509—512; *Ward* v. *Dey*, (1849) 7 Ecc. & Mar. Cas. 96, 101—106.

(*l*) *Sussex Peerage Case*, *supra*.

(*m*) *R.* v. *Savage*, (1876) 13 Cox C. C. 178. In *R.* v. *Naguib*, [1917] 1 K. B. 359; 86 L. J. K. B. 709, upon a trial for bigamy, the prisoner, an Egyptian by birth, and a Mahomedan by religion, who had married two women in England, the first being alive at the time when he married the second, deposed that previous to his first English marriage he had been duly married in Egypt according to the rites and ceremonies of that country to an Egyptian woman whom he had divorced after the first and before the second English marriage. The court declined to accept prisoner's evidence as to the validity of the Egyptian marriage.

French *vice-consul* here would be allowed to prove the law of France as a person officially skilled, may admit of some doubt, though on one occasion the testimony of such a person was admitted by Lord Tenterden (*n*), and on another occasion the Probate Division of the High Court has allowed Persian law to be proved by a Persian ambassador (*o*). The marriage law of Hong Kong has been allowed to be proved by a former Governor of that colony (*p*), and, in an exceptional case, where the ordinary evidence could not be procured, a gentleman who, from his professional research and experience of the marriage laws of the colony in question, was in the opinion of the court sufficiently qualified, was permitted to give evidence as to the validity of a marriage in Malta, although he was neither a lawyer of that colony nor the holder of any official situation connected with it (*q*). But, in general, the law of a foreign country cannot be proved even by a jurisconsult, if his knowledge of it be derived solely from his having studied it at a university in another country (*r*). Neither can a barrister practising in the Privy Council prove the law of Canada, though an appeal lies from that country to the Privy Council (*s*); and neither, as it seems, can a merchant or other person, who holds no official situation, and who is unconnected with the legal profession, be heard to expound the law, though the judge may be satisfied that he really possesses ample knowledge on the subject (*t*). In *Barford* v. *Barford & M'Leod*, which was a petition for the dissolution of a marriage celebrated in Monte Video in the Republic of Uruguay, no lawyer practising in Uruguay could be found in England and the court accepted, to prove the validity of the marriage, the evidence of a Doctor of Law who had been called to the Bars of England, Madrid, and three Spanish speaking countries in South America. He was, by virtue of a treaty, entitled on application to a diploma entitling him to practice in Uruguay, and had for some years been studying and advising on the laws of Spanish speaking countries (*u*). If the question, however, relates to a foreign custom or usage, any witness will be admissible who is acquainted with the fact (*v*); and, therefore, a London hotel-keeper, who was formerly a merchant and stockbroker

(*n*) *Lacon* v. *Higgins*, (1822) 3 Stark. 178; 25 R. R. 779.

(*o*) *In goods of Dost Aly Khan*, (1880) 6 P. D. 6; 49 L. J. P. & A. 78.

(*p*) *Cooper King* v. *Cooper King*, [1900] P. 65; 69 L. J. P. 33.

(*q*) *Wilson* v. *Wilson*, *supra*.

(*r*) *Bristow* v. *Sequeville*, (1850) 5 Ex. 275; 19 L. J. Ex. 289; 82 R. R. 664; *Re Benelli*, (1875) 1 P. D. 69; 45 L. J. P. & A. 42.

(*s*) *Cartwright* v. *Cortwright*, (1878) 26 W. R. 684.

(*t*) Per Ld. Lyndhurst, C., stating the unanimous opinion of the judges and the Lords, in *Sussex Peerage Case*, *supra*, and overruling *R.* v. *Dent*, (1843) 1 Car. & K. 97.

(*u*) [1918] P. 140; 87 L. J. P. 68.

(*v*) *Ganer* v. *Lancsborough*, (1790) 1 Pea. 18; 3 R. R. 647; explained by Ld. Lyndhurst, C., in *Sussex Peer.*, *supra*. See *Mostyn* v. *Fabrigas*, (1774) 1 Cowp. 174; *Feaubert* v. *Turst*, (1702) Prec. Ch. 207.

at Brussels, has been permitted to prove the mercantile usage in Belgium, with respect to the presentment of a promissory note that was made payable in a particular place (*x*).

§ 1426. The question how far a party is at liberty to discredit his own witness, was agitated for years, and at length was settled by the Legislature. The Common Law Procedure Act, 1854 (*y*), contained an enactment on the subject, which is reproduced in the Criminal Procedure Act, 1865 (*z*). This Act applies to "all courts of judicature, as well criminal (*a*) as all others, and to all persons having, by law or consent of parties, authority to hear, receive, and examine evidence" (*b*). Section 3 provides: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness in the opinion of the judge prove adverse (*c*), contradict him by other evidence, or, by leave of the judge (*d*), prove (*e*) that he has made at other times a statement inconsistent with his present testimony (*f*); but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement" (*g*).

(*x*) *Vander Donckt* v. *Thellusson*, (1849) 8 C. B. 812; 19 L. J. C. P. 12; 79 R. R. 761.

(*y*) 17 & 18 V. c. 125, s. 22; repealed, 55 & 56 V. c. 19.

(*z*) 28 & 29 V. c. 18.

(*a*) See *R.* v. *Little*, (1883) 15 Cox C. C. 319.

(*b*) S. 1.

(*c*) That is, "hostile," as distinguished from merely unfavourable. See *Greenough* v. *Eccles*, (1859) 5 C. B. (N.S.) 786; 28 L. J. C. P. 160; 116 R. R. 865. In *Dear* v. *Knight*, (1859) 1 F. & F. 433, Erle, J., appears to have regarded a witness as "adverse," simply because he made a statement contrary to what he was called to prove. See also *Pound* v. *Wilson*, (1865) 4 F. & F. 301. A hostile witness has been defined as "one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the court" (Wilde, J.O., in *Coles* v. *Coles*, (1866) L. R. 1 P. & D. 70; 35 L. J. P. & M. 40). A party who calls his opponent cannot as a right treat him as hostile, the matter being solely in the discretion of the court: *Price* v. *Manning*, (1889) 42 Ch. D. 372; 58 L. J. Ch. 649.

(*d*) The judge's discretion under this section is absolute, and not the subject of appeal: *Rice* v. *Howard*, (1886) 16 Q. B. D. 681; 55 L. J. Q. B. 311. See also *Faulkner* v. *Brine*, (1858) 1 F. & F. 254.

(*e*) Nevertheless, a party may, without the judge's opinion or leave, indirectly discredit his own witness by calling other relevant evidence which contradicts such evidence: Stephen, Dig. Ev. note xlvii. See the point fully discussed, Greenleaf on Ev. (15th ed.), § 444; and *Melluish* v. *Collier*, (1850) 15 Q. B. 878.

(*f*) *Reed* v. *King*, (1858) 30 L. T. 290; *Jackson* v. *Thomason*, (1862) 1 B. & S. 745; 31 L. J. Q. B. 11; 124 R. R. 734; *Coles* v. *Coles*, *supra*. See also *Ryberg* v. *Ryberg*, (1863) 32 L. J. P. & M. 112, where Sir C. Cresswell and the counsel on both sides appear to have ignored the existence of the enactment.

(*g*) This enactment is borrowed in great part from §§ 1845, 1848, of the N. York Civ. Code, under which sections, "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony; but before this can be done, the statements must be

§ 1427. In civil cases, by Ord. XXXVI., r. 38, "The Judge may, in all cases, disallow any question put in cross-examination of any party or other witness which may appear to him vexatious and not relevant to any matter proper to be inquired into in the cause or matter" (*h*). The enactment set out in § 1426, being, as there stated, of general application, applies to all the Divisions of the High Court in England or Ireland, and to examinations conducted by an examiner of those courts respectively. Since the examiner, however, has no power to determine questions as to the relevancy or adverse nature of the evidence of a witness, or, in other respects, to act as a judge, he cannot himself give leave under the Act to produce counter evidence; but a special application for that purpose must be made to the court (*i*). When an examiner has reason to believe that a party will seek to avail himself of the statutory power of discrediting his own witness, he should take down the particular questions, as well as the answers upon which counter evidence may be required (*k*).

§ 1428. When a witness has been called by one party, the other party, as soon as the examination in chief is closed, has a right to cross-examine him. The exercise of this right (*l*) is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a court or jury; for, however

related to him, with the circumstances of times, places, and persons present; and he must be asked whether he has made such statements, and if so, allowed to explain them. If the statements be in writing they must be shown to the witness before any question is put to him concerning them." The Scotch law on this subject is defined by the Act of 15 & 16 V. c. 27, which in section 3 enacts, that "it shall be competent to examine any witness who may be adduced in any action or proceeding, as to whether he has on any specified occasion made a statement on any matter pertinent to the issue, different from the evidence given by him in such action or proceeding; and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

(*h*) As to cross-examination, see *infra*, § 1430; and also *Lever* v. *Goodwin*, (1887) 36 Ch. D. 1.

(*i*) *Buckley* v. *Cooke*, (1854) 1 K. & J. 29; 103 R. R. 16.

(*k*) *Id.*

(*l*) Greenleaf on Ev. (15th ed.), § 446.

artful the fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be extended (*m*).

(*m*) St. Ev. 186. On the subject of examining and cross-examining witnesses *viva voce*, Quintilian gives the following instructions :—" Primum est, nôsse testem. Nam timidus tereri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest : prudens vero et constans, vel tanquam inimicus et pervicax, dimittendus statim, vel non interrogatione, sed brevi interlocutione patroni, refutandus est; aut aliquo, si continget, urbane dicto refrigerandus; aut, si quid in ejus vitam dici poterit, infamiâ criminum destruendus. Probos quosdam et verecundos non aspere incessere profuit; nam sæpe, qui adversus insectantem pugnâssent, modestiâ mitigantur. Omnis autem interrogatio, *aut in causâ est, aut extra causam. In causâ* (sicut accusatori præcepimus), patronus quoque altius, unde nihil suspecti sit, repetitâ percontatione, priora sequentibus applicando, sæpe eo perducit homines, ut invitis, quod prosit, extorqueat. Ejus rei, sine dubio, nec disciplina ulla in scholis, nec exercitatio traditur; et naturali magis acumine, aut usu contingit hæc virtus. . *Extra causam* quoque multa, quæ prosint, rogari solent, de vitâ testium aliorum, de suâ quisque, si turpitudo, si humilitas, si amicitia accusatoris, si inimicitiæ cum reo, in quibus aut dicant aliquid, quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis *interrogatio debet esse circumspecta*; quia multa contra patronos venuste testis sæpe respondet, eique præcipue vulgo favetur; tum verbis quam maxime ex medio sumptis; ut qui rogatur (is autem sæpius imperitus) intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est." Quintil. Inst. Orat. lib. 5, c. 7. Alison observes on the same subject :—" It is often a convenient way of examining, to ask a witness, whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that stage of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got, than by putting separate questions; for the witnesses generally think over the subjects on which they are to be examined in criminal cases so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel. Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases, there is no good ground, on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from the most unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal." Alison, Pract. of Cr. L. 546, 547. See also Evans on Cross-exon. in his Append. to Poth. Obl., No. 16, Vol. 2, pp. 233, 234. Lord Bacon, in his Essay on Cunning, shrewdly observes :—" A sudden, bold, and unexpected question doth many times surprise a man, and lay him open. Like to him that, having changed his name,

§ 1429. Such being the importance which is properly attached to the right of cross-examination, it is not surprising that questions should occasionally arise, as to whether the witness has been so called by the one party as to entitle the other party to exercise this right. And here it is clear, that if the witness be called under a *subpœna duces tecum*, merely for the purpose of producing a document, which either requires no proof, or is to be identified by another witness, he need not be sworn, and if unsworn, he cannot be cross-examined (*n*). So, if a witness be sworn under a mistake, whether on the part of counsel or of the officer of the court, and that mistake be discovered before the examination in chief has substantially begun, no cross-examination will be allowed (*o*). Neither has the adverse party any right to cross-examine a witness, whose examination in chief has been stopped by the judge, after his having answered a merely immaterial question (*p*). But, on the other hand, it is by no means necessary that the witness should have been actually examined in chief; for if he has been intentionally called and sworn, and is moreover a competent witness, the opposite party has, in strictness, a right to cross-examine him, though the party calling him has declined to ask a single question (*q*). Where witnesses are simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting under special circumstances (*r*); but no rule of law expressly forbids this course. Where a witness, in a civil action, is called and examined by the judge himself (which can only be done with the consent of the parties (*s*)) it is in his discretion whether or not cross-examination of the witness shall be permitted, but when evidence is given by a witness so called which is material, the party affected is usually allowed to cross-examine, though only as to such of the wit-

and walking in Paul's, another suddenly came behind him and called him by his true name, whereat straightways he looked back." This "dodge" has been successfully practised on a deserter, who—after solemnly asserting that he had never been a soldier—betrayed his falsehood by obeying a sudden word of command to "stand at ease!" Ld. Abinger, C.B., whose powers as a cross-examining counsel were unrivalled, was fond of giving his juniors this advice :—"Never drive out two tacks by trying to hammer in a nail."

(*n*) *Summers* v. *Moseley*, (1834) 2 Cr. & M. 477; 3 L. J. Ex. 128; 39 R. R. 818; *Perry* v. *Gibson*, (1834) 1 A. & E. 48; 3 L. J. K. B. 138; 40 R. R. 251; *Rush* v. *Smith*, (1834) 1 Cr. M. & R. 94; 3 L. J. Ex. 355; *Davis* v. *Dale*, (1830) Moo. & M. 514; *R.* v. *Murlis*, (1829) M. & M. 515; *Simpson* v. *Smith*, (1822) 2 Ph. Ev. 397; *Griffith* v. *Ricketts*, (1849) 7 Hare, 300; 19 L. J. Ch. 100; 82 R. R. 111.

(*o*) *Wood* v. *Mackinson*, (1840) 2 M. & Rob. 273; *Clifford* v. *Hunter*, (1827) 3 C. & P. 16; *Rush* v. *Smith*, *supra*; *Reed* v. *James*, (1815) 1 Stark. 132.

(*p*) *Crecvy* v. *Carr*, (1835) 7 C. & P. 64, per Gurney, B.

(*q*) *R.* v. *Brooke*, (1819) 2 Stark. 472; 20 R. R. 723; *Phillips* v. *Eamer*, (1795) 1 Esp. 357; *Reed* v. *James*, (1815) 1 Stark. 132; *Wood* v. *Mackinson*, (1840) 2 M. & Rob. 275, 276. The same rule prevails in the Ecclesiastical Courts: *Newton* v. *Ricketts*, (1848) 6 Ecc. & Mar. Cas. 35; 83 R. R. 118.

(*r*) *R.* v. *Hodgkiss*, (1836) 7 C. & P. 298, per Alderson, B.

(*s*) *In re Enoch and Zaretzky's Arbitration*, [1910] 1 Ch. 327; 79 L. J. K. B. 363.

nesses' answers as are material (*t*). Where any person, whether he be a party to the proceedings or not, has made an affidavit, which has been filed for the purpose of being used before the court, he becomes liable to cross-examination, and he cannot be exempted from such liability by the subsequent withdrawal of the affidavit (*u*).

§ 1430. In criminal cases, although the prosecutor is not bound to call every witness whose name is indorsed on the indictment (*v*), he usually does so; and even if he declines to call any such witness, he should at least have him in court, so that he may be called for the defence, if wanted for that purpose, and the defendant is entitled to inspect the indictment to see the names of the witnesses; but the court cannot compel the prosecution to give their description or addresses (*x*). The judge, too, in his discretion, will sometimes call any witnesses that have been omitted, in order to give the prisoner's counsel an opportunity to cross-examine them (*y*). This rule applies to misdemeanours as well as to felonies (*z*), and includes every witness who has been sworn with the view of going before the grand jury, though he may not have been actually examined by that body (*a*). Indeed, in serious cases, the court will sometimes, for the furtherance of justice, direct persons to be called as witnesses, though their names do not appear on the back of the indictment, provided there is reason to believe that they are acquainted with the circumstances of the case, and are consequently capable of giving material evidence (*b*). Where a witness is thus called at the instance of the prisoner, and no question is put to him on behalf of the prosecution, he becomes the prisoner's witness (*c*), and before 1865 his counsel, though permitted to put questions in the nature of a cross-examination, could not call witnesses to contradict his statement (*d*). Neither, in such a case, can the counsel for the prosecution ask any question on re-examination, which does not arise out of the cross-examination (*e*); and, perhaps, if he has refused to call the witness, he will not be

(*t*) *Coulson* v. *Disborough*, [1894] 2 Q. B. 316.

(*u*) *Re Quartz Hill Co., ex parte Young*, (1882) 21 Ch. D. 642; 51 L. J. Ch. 940. Ord. XXXVIII. r. 28, cited *ante*, § 1396A.

(*v*) *R.* v. *Woodhead*, (1847) 2 Car. & K. 520, by all the judges; *R.* v. *Flatley*, (1842) Ir. Cir. R. 445.

(*x*) *R.* v. *Woodhead*, *supra*; *R.* v. *Cassidy*, (1858) 1 F. & F. 79; *R.* v. *Lacy*, (1848) 3 Cox C. C. 517; *R.* v. *Gordon*, (1843) 12 L. J. M. C. 84.

(*y*) *R.* v. *Simmonds*, (1823) 1 C. & P. 84; *R.* v. *Whitbread*, (1823) 1 C. & P. 84 n.; *R.* v. *Taylor*, (1823) 1 C. & P. 84 n.; *R.* v. *Beezley*, (1830) 4 C. & P. 220; *R.* v. *Bull*, (1839) 9 C. & P. 22.

(*z*) *R.* v. *Vincent*, (1839) 9 C. & P. 91.

(*a*) *R.* v. *Bodle*, (1833) 6 C. & P. 186.

(*b*) *R.* v. *Holden*, (1838) 8 C. & P. 609. See, also, *R.* v. *Chapman*, (1838) 8 C & P. 558, and *R.* v. *Orchard*, (1838) *id.* 559, n.; *R.* v. *Stroner*, (1845) 1 Car. & K. 650.

(*c*) *R.* v. *Woodhead*, (1847) 2 Car. & K. 520.

(*d*) *R.* v. *Bodle*, (1833) 6 C. & P. 187, per Gaselee, J. See now § 1426.

(*e*) *R.* v. *Beezley*, (1830) 4 C. & P. 220, per Littledale, J.

allowed to re-examine him at all (*f*). When two or more persons are tried on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony tending to criminate them (*g*). The counsel, too, for the other prisoners are entitled in such a case to reply upon his evidence (*h*). Where two prisoners are tried together, and one gives evidence affecting the other, the other prisoner has a right of cross-examining him (*i*).

§ 1431. With respect to the mode of conducting a cross-examination, it is admitted on all hands, that leading questions may in general be asked (*k*); but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness, which he is to echo back again (*l*); neither does it sanction the putting of a question, assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact (*m*). The rule ought also to receive some further qualification, where the witness is evidently hostile to the party calling him; for although it appears in one case to have been laid down, that leading questions may always be put in cross-examination, whether a witness be unwilling or not (*n*), some restriction should surely be imposed, where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head; for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him; or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust; though, no doubt, this special evil is now capable of being materially mitigated, whether at *Nisi Prius* (*o*), or in the criminal

(*f*) *R.* v. *Harris*, (1836) 7 C. & P. 581.

(*g*) *R.* v. *Burdett*, (1855) Dears. C. C. 431. So, in *Lord* v. *Colvin*, (1855) 3 Drew, 222, Kindersley, V.-C., after consulting all the equity judges, held that, before an examiner in chancery, one defendant might cross-examine another defendant's witness.

(*h*) *R.* v. *Burdett*, *supra*.

(*i*) *R.* v. *Hadwen*, [1902] 1 K. B. 882; 71 L. J. K. B. 581.

(*k*) In Scotland leading questions used not to be allowed in the cross-examination, any more than in the examination in chief; Burnet, Cr. L., c. 18, p. 465; 24 How. St. Tr. 660, n. But the modern practice of the Scottish courts on this point is similar to our own; 2 Dickson, Ev. 988.

(*l*) *R.* v. *Hardy*, (1794) 24 How. St. Tr. 659, 755.

(*m*) *Hill* v. *Coombe*, (1818), and *Handley* v. *Ward*, (1818) per Abbott, C. J., cited 1 St. Ev. 188, n. *n*.

(*n*) *Parkin* v. *Moon*, (1836) 7 C. & P. 409.

(*o*) See Ord. XXXVI., R. 36, which is as follows :—" Upon a trial with a jury, the addresses to the jury shall be regulated as follows : the party who begins, or his

courts (*p*), by the rule which entitles the counsel, who opens the case on either side, to sum up the evidence, and to point out the unsatisfactory nature of any testimony thus procured.

§ 1432. Cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case (*q*); and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence (*r*). So far has this doctrine been carried, that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary, for the sake of formal proof only, it was held, that he was thereby made a witness for all purposes, and might be cross-examined as to the whole case (*s*).

§ 1433 (*t*). Whether, when a person is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that if he afterwards recalls the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle on which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that, in common fairness, each party should alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective exam-

counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore.". See, also, *Hodges* v. *Ancrum*, (1855) 11 Ex. 214; 24 L. J. Ex. 257; 105 R. R. 495. This practice does not apply to the County Courts; *Dymoch* v. *Watkins*, (1883) 10 Q. B. D. 451.

(*p*) 28 & 29 V. c. 18, s. 2.

(*q*) *Berwick-on-Tweed Corporation* v. *Murray*, (1850) 19 L. J. Ch. 281, 286. So, by the Scotch statute law, it is now enacted, that "in any action, cause, prosecution, or other judicial proceeding, civil or criminal, where proof shall be taken, whether by the judge or a person acting as commissioner, it shall be competent for the party, against whom a witness is produced and sworn *in causâ*, to examine such witness, not in cross only, but *in causâ*," 3 & 4 V. c. 59, s. 4.

(*r*) But see *Re Woodfine*, (1878) 47 L. J. Ch. 832, where Fry, J., would not allow the defendant in an action for a legacy to cross-examine the plaintiff respecting an independent counterclaim, but directed him to recall the plaintiff as his own witness. *Sed qu.*

(*s*) *Morgan* v. *Brydges*, (1818) 2 Stark. 314; *R.* v. *Murphy*, (1841) 1 Arm. M. & O. 206.

(*t*) Gr. Ev. § 447, as to first nine lines.

inations in chief, from putting leading questions with regard to their own (*u*). Accordingly, it has been held in Ireland, that a plaintiff may cross-examine any of his own witnesses, on their being afterwards called on behalf of the defendant (*v*). In one English case (*x*), however, Lord Kenyon is reported to have ruled, that a plaintiff's witness, who was recalled by the defendant to establish a plea of tender, might, in such examination in chief, have leading questions put to him as in an ordinary cross-examination; but the soundness of this decision, if cited in support of a general rule, may be doubted.

§ 1434 (*y*). The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute (*z*), is not usually applied in cross-examinations with the same strictness as in examinations in chief; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put (*a*). On this head it is difficult to lay down, or rather to apply, any precise general rule (*b*). Still, one or two subsidiary rules have been clearly established, and a due attention to these will enable the practitioner to define with tolerable certainty the limits, within which questions on cross-examination must be confined.

§ 1434A. First, by virtue of a rule which has been set out in a previous section, the judge may now in all cases disallow any questions put in cross-examination which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter (*c*).

§ 1435. Next, the answer of a witness to a question put in cross-examination respecting any fact irrelevant to the issue, with the exception of an answer to a question whether the witness has been convicted of a felony or misdemeanour (*d*), is conclusive, and evidence cannot be called on the other side to show that the answer is un-

(*u*) 1 St. Ev. 187; 2 Ph. Ev. 401.
(*v*) *Malone* v. *Spillessy*, (1842) Ir. Cir. R. 504. See, too, *Lord* v. *Colvin*, (1855) 3 Drew. 222; 24 L. J. Ch. 517; 106 R. R. 322.
(*x*) *Dickinson* v. *Shee*, (1801) 4 Esp. 67.
(*y*) Gr. Ev. § 449, in part.
(*z*) *Ante*, § 316, *et seq.*
(*a*) *Haigh* v. *Belcher*, (1830) 7 C. & P. 389.
(*b*) *Lawrence* v. *Baker*, (1830) 5 Wend. 305.
(*c*) Ord. XXXVI., R. 38, set out *ante*, § 1426.
(*d*) *Post*, § 1437.

true (*e*), neither can an irrelevant question be put to a witness on cross-examination for the mere purpose of impeaching his credit by contradicting him. For instance, it was held prior to the repeal of the usury laws (*f*), that in a penal action for usury, alleged to have been committed in a contract made by the defendant with a witness who was called to establish the offence, the defendant's counsel could not cross-examine this witness as to other contracts made by him with other persons about the same time, in order to draw an inference that the contracts were all of the same nature, if the witness stated that the latter were not usurious, and to contradict him by extrinsic proof, if he said that they were (*g*). Again, on the trial of an issue, whether the defendant's manufactory emitted smoke prejudicial to the plaintiff's garden, where both parties had examined witnesses as to the effect of the works on neighbouring grounds, a witness was called by the defendant, who described several gardens in the neighbourhood as uninjured. In cross-examination, he was asked whether he knew Glasgow field, and having answered that he did, but that "he never knew of any damage done there," the counsel for the plaintiff proposed to ask him, "Whether he had known of any sum having been paid by the defendant to the proprietors of Glasgow field, for alleged damage occasioned by the works?" The learned judge, however, refused to allow this question to be put, and on a bill of exceptions, the House of Lords confirmed the ruling (*h*).

§ 1436. Thirdly, with the view of impeaching the character of a witness, he (other than a prisoner giving evidence (*i*)), may always be asked on cross-examination (*k*),—though, as will be presently seen, he is not always compelled to answer (*l*),—questions with regard to alleged crimes or other improper conduct on his part; and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence although denied by the witness; but, if it be irrelevant, the answer of the witness, when he makes any, must at common law

(*e*) See *Baker* v. *Baker*, (1863) 32 L. J. P. & M. 145; 3 Sw. & Tr. 213; *Harris* v. *Tippett*, (1811) 2 Camp. 637; 11 R. R. 767; *Ex parte Arnsby*, (1833) 2 Deac. & C. 213; *Goddard* v. *Parr*, (1855) 24 L. J. Ch. 783; *In re Haggermacher's Patent*, [1898] 1 Ch. 280; 67 L. J. Ch. 675.

(*f*) By 17 & 18 V. c. 90.

(*g*) *Spenceley* v. *De Willott*, (1806) 7 East, 108.

(*h*) *Tennant* v. *Hamilton*, (1839) 7 Cl. & F. 122; 51 R. R. 1.

(*i*) See *ante*, § 1372*c*.

(*k*) *Harris* v. *Tippett*, *supra*; *R.* v. *Yewin*, (1811) *id.* 639; *R.* v. *Edwards*, (1791) 4 T. R. 440; 2 R. R. 427; *R.* v. *Barnard* and *R.* v. *James*, (1823) cited in n., 1 C. & P. 86, 87; *R.* v. *Watson* (1817) 2 Stark. 149. The cases of *R.* v. *Lewis*, (1802) 4 Esp. 225; *Macbride* v. *Macbride*, (1802) *id.* 242; and *R.* v. *Pitcher*, (1817) 1 C. & P. 85, where questions tending to degrade the witness were not allowed to be put, cannot now be regarded as authorities.

(*l*) *Post*, § 1453, *et seq.*

be regarded as conclusive; and whether he answers or not, no independent proof can be given to establish the truth of the imputation (*m*).

§ 1437. An exception (*n*) to this last rule has been recognised by the Legislature, and the Act of 28 & 29 V. c. 18, enacts, in section 6, that "a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction"; and this, too, although the fact of such conviction be altogether irrelevant to the matter in issue in the cause (*o*). When an accused is called as a witness on his own behalf in a criminal prosecution, the Act only applies under the conditions set out *ante*, in § 1372c. The Act goes on to provide, that "a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same" (*p*).

§ 1438. Fourthly, with respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down, that if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot. It becomes, then, necessary to ascertain what matters connected with the witness are or are not relevant; and here, in addition to what has been stated in a former chapter (*q*), it should be observed, that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct

(*m*) *R.* v. *Watson*, *supra*; *R.* v. *Rudge*, (1805) Pea. Add. Cas. 232; 49 R. R. 906; *Goddard* v. *Parr*, (1855) 24 L. J. Ch. 783. If the statement be material to the issue, although irrelevant, the witness if he swear falsely may be indicted for perjury, and any matter going to the credit of a material witness is material to the issue, *R.* v. *Baker* [1895] 1 Q. B. 797; 64 L. J. M. C. 177.

(*n*) See the reasons for this exception as stated by the Com. Law Commiss., in their 2nd Rep. pp. 21, 22.

(*o*) *Ward* v. *Sinfield*, (1880) 49 L. J. C. P. 696. This case was a decision on 17 & 18 V. c. 125, s. 25, which contains almost identically the same language as the section cited in the text.

(*p*) This enactment extends, by s. 1, to "all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence," whether in England or Ireland. In New York, "a witness must answer as to the fact of his previous *conviction* for felony." See Civ. Code, § 1854.

(*q*) *Ante*, § 335, *et seq.*

be not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers, except in the case of an actual conviction, must be taken as conclusive (*r*). This rule extends to parties to the record, when giving testimony, as well as to other witnesses; and therefore, in an action for an indecent assault, where the defendant was examined as a witness on his own behalf, and denied the charge, the court held that, although he might be cross-examined with respect to alleged improprieties committed by him towards other persons, these collateral imputations could neither be disproved on the one hand, nor supported on the other, by independent evidence (*s*).

§ 1439. The rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion, by raising an almost endless series of collateral issues (*t*). The rejection of the contradictory testimony may indeed sometimes exclude the truth; but this evil, acknowledged though it be, is as nothing compared with the inconveniences that must arise were a contrary rule to prevail (*u*). The case of *Alcock* v. *Royal Exchange Insurance Co.* (*v*) forms no real exception to the above rule. There, an action was brought by a shipowner against underwriters on a policy of insurance, and the plaintiff's claim to recover as for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness for the plaintiff, and, on cross-examination, denied that previous to the voyage insured against he had been an habitual drunkard. The defendants thereupon called witnesses to establish that fact, and the court held that their evidence was clearly admissible, as tending to show that the captain was not likely to have exercised a sound judgment in reference to the abandonment, and that, consequently, the judgment actually exercised by him was not entitled to any respect from the jury.

§ 1440. Whether questions respecting the *motives, interest, or conduct* of the witness, as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities differ. On the one hand, it has been held relevant to the guilt or innocence

(*r*) *Goddard* v. *Parr*, (1855) 24 L. J. Ch. 784.

(*s*) *Tolman & Ux.* v. *Johnstone*, (1860) 2 F. & F. 66; 121 R. R. 766, per Cockburn, C. J., after consulting the other judges. See, also, *Baker* v. *Baker*, (1863) 32 L. J. P. & M. 145; 3 Sw. & Tr. 213.

(*t*) *Att.-Gen. v. Hitchcock*, (1847) 1 Ex. 93, 94; per Parke, B., 103, 104, per Alderson, B., 16 L. J. Ex. 259; 74 R. R. 592.

(*u*) *Att.-Gen.* v. *Hitchcock*, *supra*.

(*v*) (1849) 13 Q. B. 292; 18 L. J. Q. B. 121; 78 R. R. 364.

of a person charged with a crime, to inquire of the witness for the prosecution, in cross-examination, whether he had not expressed feelings of hostility towards the prisoner (*x*); and the like inquiry has been made in a civil action (*y*). On an indictment for rape, or for an attempt to commit that crime, the prosecutrix may, on cross-examination, be asked whether she had not on former occasions consented to the prisoner's embraces (*z*). In all these cases, if the witness under cross-examination denied the fact imputed, he was exposed to contradiction by other witnesses. So, on the trial of Lord Stafford for high treason, he was allowed to adduce proof that one of the witnesses for the prosecution had attempted to suborn several persons to give false evidence against him (*a*); and in the *Queen's Case*, the judges appear to have considered such a course unobjectionable, provided the witnesses were first cross-examined upon the subject (*b*). In an action on a promissory note, the making of which was denied, the attesting witness was asked whether she was not the plaintiff's mistress, and upon her denying the suggestion defendant was allowed to call witnesses to contradict her (*c*).

§ 1441. On the other hand, it has been several times ruled that, if a witness denies that he has tampered with the other witnesses, evidence to contradict him cannot be received (*d*). So, where a witness called to character, denied having ever said that the prisoner should be acquitted if it cost him £20, the court decided that the counsel for the prosecution must rest satisfied with the answer (*e*); and in a civil action, where the defendants sought to disparage the testimony of a witness of the plaintiff, by proving some circumstances indicating a hostile spirit towards themselves, the learned judge is reported to have held that it could not be done (*f*). Again, where the principal witness against a man indicted for theft, was his apprentice, who, being asked in cross-examination whether he had not been charged with robbing his master, denied the fact, the prisoner's counsel

(*x*) *R.* v. *Yewin*, (1811) 2 Camp. 638.

(*y*) *Attwood* v. *Welton*, (1828) 7 Conn. 66.

(*z*) *R.* v. *Riley*, (1887) 18 Q. B. D. 481; 56 L. J. M. C. 52; *R.* v. *Martin*, (1834) 6 C. & P. 562; recognised by Kelly, C. B., in *R.* v. *Holmes & Furness*, (1871) L. R. 1 C. C. R. 334; 41 L. J. M. C. 14. *Secus*, as to intercourse with *other* men, *infra*, § 1441.

(*a*) (1680) 7 How. St. Tr. 1400.

(*b*) (1820) 2 Br. & B. 311. Recognised by Parke, B., in *Att.-Gen.* v. *Hitchcock*, *supra*.

(*c*) *Thomas* v. *David*, (1836) 7 C. & P. 350; 48 R. R. 794. In *A. G.* v. *Hitchcock*, *supra*, Alderson, B., explained this ruling on the ground that the question "had a bearing on the general status of the witness," an explanation which the Court of Criminal Appeal found it difficult to understand in *R.* v. *Cargill*, [1913] 2 K. B. 271; 82 L. J. K. B. 655.

(*d*) *R.* v. *Lee*, (1838) 2 Lewin C. C. 154; *Harris* v. *Tippett*, (1811) 2 Camp. 637.

(*e*) *R.* v. *Lee*, *supra*.

(*f*) *Harrison* v. *Gordon*, (1838) 2 Lewin C. C. 156.

was not allowed to prove that the answer was false (*g*). So, also, on indictments for rape, or for an attempt to commit rape, or for an indecent assault, though the principal female witness may be cross-examined with the view of showing that she has previously been guilty of incontinence with other men, yet her answers to such questions must be taken as conclusive, and her supposed paramours cannot be called as witnesses for the purpose of contradiction (*h*). The same law would seem to apply in actions for seduction, and on summonses for affiliation, unless the evidence would directly tend to show that the defendant was not in point of fact the father of the child (*i*).

§ 1442. Such being the conflict of authorities, it is no easy matter to apply the rule with precision to any new combination of facts; but probably a lawyer, who was really anxious to promote the interests of truth and justice, would on most occasions feel inclined to follow the former, rather than the latter, class of cases. Indeed, this view of the law is strongly confirmed by a case in the Exchequer, where the learned Barons intimated a tolerably decisive opinion, that a witness might be asked any questions tending to impeach his impartiality, and that his answers might be contradicted by other witnesses. "It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced frame of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that you may give evidence of what he said, not with a view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed" (*k*). No doubt it is an object of great importance to confine the attention of the jury as much as possible to the specific issues; but it seems highly essential to the discovery of truth,

(*g*) *R.* v. *Yewin*, (1811) 2 Camp. 638.

(*h*) *R.* v. *Holmes & Furness*, (1871) L. R. 1 C. C. R. 334; 41 L. J. M. C. 12; affirming *R.* v. *Hodgson*, (1812) R. & R. 211, and overruling *R.* v. *Robins*, (1843) 2 M. & Rob. 512. See, also, *R.* v. *Cockcroft*, (1870) 11 Cox, C. C. 410. A defendant may, however, give general evidence of the woman's character for want of chastity, or that she is a common prostitute: *R.* v. *Riley*, *supra*. See, also, *R.* v. *Cargill*, *supra*.

(*i*) *Garbutt* v. *Simpson*, (1863) 32 L. J. M. C. 186; 2 N. R. 276. In *Verry* v. *Watkins*, (1836) 7 C. & P. 308, Alderson, B., in an action of seduction allowed witnesses, irrespective of the question of paternity, to give evidence of their having had connexion with the plaintiff's daughter. *Sed qu.*, since the last decisions. See, also, on this subject, and attempt to reconcile, *Andrews* v. *Askey*, (1837) 8 C. & P. 7; and *Dodd* v. *Norris*, (1814) 3 Camp. 519; 14 R. R. 832.

(*k*) Pollock, C.B., in *Att.-Gen.* v. *Hitchcock*, (1847) 1 Ex. 94, 100, 102; 16 L. J. Ex. 259; 74 R. R. 592.

that those who are to determine the respective value of conflicting testimony, should be enabled to discriminate between the interested and disinterested witnesses; and no test of interest can be more sure than that which is afforded by the conduct of the witness himself. The argument that a witness cannot come prepared to defend himself against particular charges without notice, may be a very good reason why evidence that he has been guilty of a specific crime, unconnected with the cause or parties, should not be adduced—because, even were such a fact proved, it would raise, in the absence of interest, only a very faint presumption that he had been guilty of perjury—but this argument should not be allowed to extend to a case where the charge, if true, would show that the witness either had a motive to swear falsely, or was not very scrupulous in the selection of means to attain his end. A charge, too, of this nature would, almost of necessity, apply to some act of recent date, and as such might be easily explained or rebutted by the witness, if it were made without foundation. Moreover, this inquiry would seem at the present day to be all the more necessary, as witnesses are no longer incompetent to testify on the ground of interest or crime.

§ 1443. Assuming, however, that a witness may in all cases be cross-examined, and, if necessary, contradicted, for the purpose of showing that his mind is not in a state of impartiality as between the two contending parties, it must clearly appear, before the contradictory evidence can be admitted, that the questions answered had a direct tendency to prove that the witness was under the influence of an undue bias. This doctrine was established by the case of the *Attorney-General* v. *Hitchcock* (*l*). That was an information under the revenue laws, and a witness, who had given material evidence for the Crown, was asked, on cross-examination, whether he had not said that the officers of the Crown had offered him £20 to give that evidence. He denied that he had ever said so, and the Court held that evidence to contradict him was inadmissible. Nor can it be doubted but that this decision was correct; for as the mere offer of a bribe, if unaccepted, could not in fairness prejudice the character of the party to whom it was made, it was obviously immaterial what the witness might have said upon the subject. Had the witness been asked whether he had said that he had received a bribe, and had he denied that he had ever made such a statement, the decision probably would have been very different.

§ 1444. Since the case of the *Attorney-General* v. *Hitchcock* was decided, the rule of law supposed to have been laid down by that decision, has been elaborately discussed in the Irish Court of Criminal

(*l*) *Supra.*

Appeal (*m*). The question arose in this way. On the trial of a prisoner for rape, a witness was called on his behalf, who professed his inability to speak English. He was therefore sworn in Irish, and he enjoyed the advantage—which to a dishonest witness is no slight one—of giving his evidence through an interpreter (*mm*). On cross-examination he was pressed as to his knowledge of the English language, and was pointedly asked whether he had not very recently spoken English to two persons who were present in court. He denied that he had done so, and these two persons were called to contradict him. The question was whether their testimony was admissible. Ten of the learned judges heard the argument; seven held that the evidence could not be received, while three were of opinion that it could (*n*). The arguments advanced by the minority in this case are certainly entitled to grave consideration, and might yet very possibly be upheld in England, should the same point arise here. Where a prosecutrix gives evidence in chief of matter which was not relevant to the issue, but which was highly prejudicial to the prisoner, *e.g.*, that he seduced her (the charge being carnal knowledge between thirteen and sixteen), the prisoner was held not entitled to call evidence to prove that prosecutrix had previously had connection with other men, she having denied the suggestion in cross-examination (*o*).

§ 1445. It is certainly relevant to put to a witness any question, which, if answered in the affirmative, would qualify or contradict some previous part of his testimony given on the trial of the issue; and if such question be put, and be answered in the negative, the opposite party may then contradict the witness, and for this simple reason, that the contradiction would qualify or contradict the previous part of the witness's testimony, and so neutralise its effect (*p*). In accordance with this general principle, a witness may be cross-examined as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony; and if he either denies, or does not distinctly admit, that he has made such statement, proof may be given that he did in fact make it; but both in civil and criminal cases (*q*) before such proof can be given (*r*), the circumstances of the supposed statement, sufficient to designate the particular

(*m*) *R.* v. *Burke*, (1858) 8 Cox, C. C. 44.

(*mm*) See *ante*, § 56.

(*n*) The three dissenting judges were O'Brien, J., Pigot, C. B., and that profound lawyer, Pennefather, B.

(*o*) *R.* v. *Cargill*, [1913] 2 K. B. 271; 82 L. J. K. B. 655. Matter which is not relevant to the issue does not cease to be irrelevant because introduced by the prosecution.

(*p*) *Att.-Gen.* v. *Hitchcock*, *supra*.

(*q*) 28 & 29 V. c. 18, s. 1.

(*r*) This rule prevails in Equity, *Hemming* v. *Maddick*, (1872) L. R. 7 Ch. 395; 41 L. J. Ch. 522.

occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (*s*). So, if the case be such as to render evidence of opinion admissible and material, as, for instance, if the witness has been examined as to his belief respecting the identity, or the handwriting, or the sanity of any person, or if he be a skilled witness called to state his opinion on a matter of science, he may be asked on cross-examination, whether he has not on some particular occasion expressed a different opinion upon the same subject; and if he deny the fact, it may be proved by other evidence. But (*t*) if a witness has simply testified to a fact, his previous opinion as to the merits of the cause cannot be regarded as relevant to the issue (*u*). Therefore, in an action upon a marine policy, where the broker, who had effected the policy for the plaintiff, stated as a witness for the defendant that he had omitted to disclose a certain fact, now contended to be material to the risk, and on being cross-examined as to whether he had not expressed his opinion that the defendant had not a leg to stand upon, denied that he had said so; this was deemed conclusive, and evidence to contradict him in this particular was rejected (*v*).

§ 1446. If a witness has made a previous statement in writing as to the facts of a case, he has been, since 1854 (*x*), and is now, under a

(*s*) See *Angus* v. *Smith*, (1829) Moo. & M. 473; *Crowley* v. *Page*, (1837) 7 C. & P. 789; *Andrews* v. *Askey*, (1837) 8 C. & P. 7; *Magrath* v. *Browne*, (1841) Arm. M. & O. 133; *The Queen's Case*, (1820) 2 Br. & B. 313, 314; 22 R. R. 685. The Criminal Procedure Act, 1865 (28 & 29 V. c. 18), which applies to all courts, civil or criminal (s. 1), provides in s. 4 : "if a witness, upon cross-examination as to a former statement made by him relevant to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." This enactment overrules *Pain* v. *Beeston*, (1830) 1 M. & Rob. 20; and *Long* v. *Hitchcock*, (1840) 9 C. & P. 619. See *R.* v. *Whelan*, (1881) 14 Cox, C. C. 595.

(*t*) Gr. Ev. § 449, almost verbatim.

(*u*) *Daniels* v. *Conrad*, (1833) 4 Leigh, R. 401, 405.

(*v*) *Elton* v. *Larkins*, (1832) 5 C. & P. 385, 390, 391; 34 R. R. 676, per Tindal, C. J.

(*x*) Under ss. 24 and 103 of the Common Law Procedure Act, 1854 (17 & 18 V. c. 125), which are now repealed, and in Ireland under ss. 27 and 98 of the Common Law Procedure Amendment Act (Ireland), 1856 (19 & 20 V. c. 102). The law is the same in India : see Ind. Evid. Act of 1855, s. 34. The common law rule was that the cross-examining party was obliged, when it was in writing, to show his contradictory statement to the witness, and afterwards put it in as his own evidence : see *The Queen's Case*, (1820) 2 Br. & B. 287; 22 R. R. 664; and *Macdonnell* v. *Evans*, (1852) 11 C. B. 930; 21 L. J. C. P. 141; 87 R. R. 818. This rule excluded one of the best tests by which a witness's memory and integrity could be tried : see article by Lord Brougham in Ed. Rev., vol. 69, p. 22, and his speech on Law Reform, vol. 2, Lord Brougham's Speeches, p. 447. See, also, the general reasons for changing the law, ably stated in the Second Report of Common Law Commissioners, at pp. 19—21. See, also, 1st edit. of this work, § 1057.

provision in the Act of Parliament (*y*) extending to all courts (*z*), liable to be cross-examined upon such statement without its previous production (*a*).

§ 1447 (*b*). If it should appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been lost or destroyed, the proviso just cited, empowering the judge to require its production, will of course become inoperative. In such a case, therefore, it is apprehended that the witness might be cross-examined as to the contents of the paper, notwithstanding its non-production; and that, if it were material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first interpose evidence out of his turn, to prove the loss or destruction of the document, or to show that it was in the hands of the opponent, that he had had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents (*c*). In former times this course was deemed irregular (*d*), but modern authorities are not wanting to show that it would now be generally allowed. Thus, if the paper in question be not in the actual possession of the cross-examining party, he may, before commencing his cross-examination, or during its progress, direct any person, whom he has served with a subpœna *duces tecum*, to produce the writing (*e*), or call upon the adversary to do so, if the paper is in his hands, and he has had notice to produce it (*f*). The counsel for a prisoner has also been allowed to interpose proof of the loss of the original depositions, and of the correctness of a copy, and then to cross-examine the witness, the copy being first duly read (*g*). In another case, a witness was permitted to be cross-examined upon an office copy of an affidavit made by her, the affidavit itself being filed, and the cross-examining counsel having put

(*y*) 28 & 29 V. c. 18.

(*z*) S. 1.

(*a*) The words of this enactment (28 & 29 V. c. 18, s. 5) are as follows :—"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment, or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him : Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

(*b*) Gr. Ev. § 464, slightly as to first eight lines.

(*c*) See 1 St. Ev. 205, n. *d*.

(*d*) *Graham* v. *Dyster*, (1816) 2 Stark. 23; *Sideways* v. *Dyson*, (1817) *id.* 49.

(*e*) *Att.-Gen.* v. *Bond*, (1839) 9 C. & P. 189; 62 R. R. 742.

(*f*) *Calvert* v. *Flower*, (1836) 7 C. & P. 386; 48 R. R. 796.

(*g*) *R.* v. *Shellard*, (1840) 9 C. & P. 279.

in an order to admit the document to be a true copy (*h*). If (*i*), in any particular case, this course of proceeding would be likely to occasion inconvenience, by disturbing the regular progress of the cause and distracting the attention of the jury, the judge would be empowered to postpone the examination as to this point to a later stage in the trial (*k*).

§ 1448. Where the document which it is intended to use to contradict a witness is an affidavit sworn by him and filed, it has been questioned (*l*) whether the provision enabling the judge to call for the production of the document "for his inspection" renders it necessary that the original should be forthcoming, or whether an office (*m*) or examined copy will suffice. It is thought that an office or examined copy is receivable in such a case (*n*).

§ 1449. As the enactment under discussion is now applicable to courts of criminal jurisdiction (*o*), as well as to civil courts, it would seem that the rules laid down by the judges as to the *mode of cross-examining witnesses* for the Crown, *with respect to what they have previously sworn before the magistrate*, are no longer in force (*oo*). Still, as some doubts may possibly be entertained on this subject, seeing that the statute in question contains a proviso expressly empowering the judge "to require the production of the writing," and "to use it for the purposes of the trial," it may be desirable to set out the rules. They are, then, as follows:—

"1. Where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and such deposition must be read as part of the evidence of the cross-examining counsel.

"2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the

(*h*) *Davies* v. *Davies*, (1840) 9 C. & P. 252. No order in such a case would now be necessary; see Ord. XXXVII., R. 4, cited *post*, § 1538; also, Ord. XXXVIII., R. 15.

(*i*) Gr. Ev. § 464, in part.

(*k*) 2 Ph. Ev. 439, 440.

(*l*) *Bastard* v. *Smith*, (1839) 10 A. & E. 213; 8 L. J. Q. B. 244; 50 R. R. 387.

(*m*) See last note but three.

(*n*) See *Ewer* v. *Ambrose*, (1825) 4 B. & C. 24; 3 L. J. (O.S.) K. B. 128; 28 R. R. 198; *Highfield* v. *Peake*, (1827) Moo. & M. 109; 31 R. R. 722; *Davies* v. *Davies*, (1840) 9 C. & P. 252; *Sainthill* v. *Bound*, (1802) 4 Esp. 74; *Garvin* v. *Carroll*, (1847) 10 Ir. L. R. 323.

(*o*) 28 & 29 V. c. 18, ss. 1, 5.

(*oo*) See *post*, § 1450A.

prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

"3. The witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination (*p*); and if the witness admits such statement to have been made, he may comment upon such admission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."

§ 1450. In accordance with these rules, it has been held that a witness for the prosecution could not be directed by the prisoner's counsel to look at his deposition and then say whether he still adhered to the statement he had just made, but the deposition had first to be read as evidence for the prisoner, and the witness might afterwards be cross-examined respecting its contents (*q*). The rules were confined to those cases in which the depositions had been duly taken and returned, and when, consequently, they would furnish the best evidence of what took place at the prior examination (*r*). Neither did they protect a witness from cross-examination as to what he had said prior to his giving his testimony before the magistrate in the presence of the prisoner, although his words might have been taken down officiously by the magistrate's clerk, and might have been afterwards verified on oath by himself when examined by the justice, so that they actually appeared in the deposition as formally returned (*s*). It seems, too, that the rules were merely intended to check the licence of the bar, and were not binding on the judges themselves, who had still a discretionary power of questioning the witness as to any discrepancy between his evidence in court and his former statement, without first putting in the depositions; but it may be questionable whether in such a case,

(*p*) *R.* v. *Curtis*, (1848) 2 Car. & K. 763.

(*q*) *R.* v. *Ford*, (1851) 2 Den. 245; *R.* v. *Palmer*, (1851) 5 Cox, C. C. 236; *R.* v. *Stokes*, (1850) 4 Cox, C. C. 451; *R.* v. *Brewer*, (1863) 9 Cox, C. C. 409.

(*r*) *R.* v. *Griffiths*, (1841) 9 C. & P. 746, per Coleridge, J., and Gurney, B.

(*s*) *R.* v. *Christopher*, (1850) 4 Cox C. C. 76.

if new facts were introduced in evidence, the counsel for the prosecution would not have been entitled to reply (*t*).

§ 1450A. Since the passing of 28 & 29 V. c. 18, the settled practice in criminal courts has been as follows:—A witness may be cross-examined as to what he said before the magistrate, the counsel cross-examining may show the witness the deposition and ask him whether he still adheres to the statement he has made in court, without the counsel reading the deposition in court or putting it in evidence, but the counsel is then bound by the answer of the witness unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is as put in (*u*).

§ 1451. The rule which requires the attention of the witness to be specially drawn to the circumstances, in respect of which it is proposed to impeach his credit by independent evidence, is not confined to the case where the witness is alleged to have made contradictory statements, but it extends alike to all cases where declarations made by a witness, or acts done by him, are tendered in evidence with the view either of contradicting his testimony in chief, or of proving that he is a corrupt witness, or that he has been guilty of attempting to corrupt others (*v*). "I like the broad rule," said Mr. Justice Patteson on one occasion, "that when you mean to give evidence of a witness's declarations for any purpose, you should ask him whether he ever used such expressions (*x*)."

§ 1452. Questions not unfrequently arise at Nisi Prius, as to whether or not a party is entitled to see a document, which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows:—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity (*y*), his adversary will have

(*t*) *R.* v. *Edwards*, (1837) 8 C. & P. 26; *R.* v. *Peel*, (1860) 2 F. & F. 23; 121 R. R. 758.

(*u*) *R.* v. *Riley*, (1866) 4 F. & F. 964; *R.* v. *Wright*, (1866) 4 F. & F. 967.

(*v*) *The Queen's Case*, (1820) 2 Br. & B. 311; 22 R. R. 685.

(*x*) *Carpenter* v. *Wall*, (1840) 11 A. & E. 804; 9 L. J. Q. B. 217; 52 R. R. 513. This case was an action for seduction, and the court seems to have considered—though the point was not decided—that for the purpose of reducing the damages, the defendant, without first cross-examining the principal female witness, might call persons to specify particular language of an indecent and unbecoming character as having been used by her; but it is submitted that in strictness this course could not be pursued, but that the defendant in such a case should be restricted to general evidence of lightness of conduct.

(*y*) *Collier* v. *Nokes*, (1849) 2 Car. & K. 1012; *Cope* v. *Thames Haven Dock Co.*, (1848) 2 Car. & K. 757; 80 R. R. 871; *Sinclair* v. *Stevenson*, (1824) 1 C. & P. 583; *Russell* v. *Rider*, (1834) 6 C. & P. 416.

no right to see the document; but if the paper be used for the purpose of refreshing the memory of the witness (*z*), or if any questions be put respecting its contents (*a*), or as to the handwriting in which it is written (*b*), a sight of the document may then be demanded by the opposite counsel. But such opposing counsel has no right to read such a document through, or to comment upon its contents till so used or put in by the cross-examining counsel. If it be not put in, its absence may be remarked upon by the counsel on the other side (*c*). The counsel on the other side will, moreover, have a right (even where it is not put in) to ask questions upon it in re-examination, without himself putting it in (*d*).

§ 1453. It has already been observed, that some questions a witness is not compellable to answer. First, this is the case where the answers would have a *tendency* to expose the witness (*e*), or, as it seems, the husband or wife of the witness (*f*), to any kind of *criminal charge*, whether in the common law or ecclesiastical (*g*) courts, or to a *penalty* or *forfeiture* (*h*) of any nature whatsoever (*i*). This rule—which is of great antiquity, and was even acted upon by Chief Justice Jefferies when it told against the prisoner (*k*)—applies equally to parties and to witnesses, and it is now uniformly recognised by all British tribunals, whether civil or criminal. A witness will not be forced to answer questions or interrogatories of such tendency (*l*); although, if any such interrogatories be administered, they will not, on that account, be struck out by the court (*m*). The same doctrine prevails in the

(*z*) *Ante*, § 1413.

(*a*) *Cope* v. *Thames Haven Dock Co.*, *supra*.

(*b*) *Peck* v. *Peck*, (1870) 21 L. T. 670.

(*c*) *Id.*

(*d*) *R.* v. *Ramsden*, (1827) 2 C. & P. 604; 31 R. R. 703.

(*e*) *R.* v. *Garbett*, (1847) 1 Den. 236.

(*f*) *Cartwright* v. *Green*, 1800) 8 Ves. 405; *R.* v. *All Saints, Worcester*, (1817) 6 M. & S. 200; *ante*, § 1369.

(*g*) *Parkhurst* v. *Lowten*, (1816) 1 Mer. 391; 15 R. R. 140, as to simony; *Brownsword* v. *Edwards*, (1751) 2 Ves. Sen. 245, as to incest; *Chetwynd* v. *Lindon*, (1752) *id.* 450; and *Finch* v. *Finch*, (1752) *id.* 493, as to concubinage.

(*h*) Qu. as to the meaning of this word . *Pye* v. *Butterfield*, (1865) 34 L. J. Q. B. 17; 136 R. R. 771; 5 B. & S. 829.

(*i*) *R.* v. *Friend*, (1696) 13 How. St. Tr. 16—18; *R.* v. *Ld. G. Gordon*, (1781) 2 Doug. 593; *R.* v. *Ld. Macclesfield*, (1725) 16 How. St. Tr. 1146—1150; *R.* v. *Slaney*, (1832) 5 C. & P. 213; 38 R. R. 805; *R.* v. *Pegler*, (1833) *id.* 521; 38 R. R. 845; *Maloney* v. *Bartley*, (1812) 3 Camp. 210; *Dandridge* v. *Corden*, (1827) 3 C. & P. 11; *Chester* v. *Wortley*, (1856) 17 C. B. 410; 25 L. J. C. P. 117; 104 R. R. 741. But see *R.* v. *Boyes*, (1861) 30 L. J. Q. B. 301; 1 B. & S. 311; 124 R. R. 571, cited *post*, § 1458.

(*k*) *R.* v. *Rosewell*, (1684) 13 How. St. Tr. 169.

(*l*) *Paxton* v. *Douglas*, (1812) 9 Ves. 225; 12 R. R. 175; *Lamb* v. *Munster*, (1882) 52 L. J. Q. B. 46; 10 Q. B. D. 110.

(*m*) *Fisher* v. *Owen*, (1878) 47 L. J. Ch. 681; 8 Ch. D. 645. This case overrules *Atherley* v. *Harvey*, (1877) 46 L. J. Q. B. 518; 2 Q. B. D. 524; *Allhusen* v. *Labouchere*, (1878) 3 Q. B. D. 654; 48 L. J. Q. B. 34; *Spokes* v. *Grosvenor Hotel Co.*,

spiritual courts (*n*), and is also part and parcel of the law of Scotland (*o*). We have already seen (*p*) that witnesses in proceedings instituted in consequence of adultery, even although they be parties to the suit, are in general protected from being asked questions tending to show that they have been guilty of adultery. In the reign of William the Third, and again so late as the year 1781, we find witnesses protected from answering the simple question whether they were Protestants or Papists (*q*).

§ 1454. Some cases justify a doubt as to whether the protection has not been carried very far beyond its legitimate bounds. Thus, in an action for a libel, contained in a voluntary affidavit, which the defendant had sworn extra-judicially before a magistrate, the court held that the magistrate's clerk was not bound to answer, whether he wrote the affidavit by the defendant's orders, and delivered it to the magistrate (*r*); and it has been decided in Ireland, that, upon a trial for the murder of a person killed in a duel, any person who was present, and in any way countenanced the proceeding, might refuse to answer any question relating thereto (*s*). It is not here intended to insinuate that these cases are wrong decisions; for numerous authorities might be cited, which clearly establish that if the fact to which the witness is interrogated, forms but a single remote link in the chain of testimony, which may implicate him in a crime or misdemeanour, or expose him to a penalty or forfeiture, he is not bound to answer (*t*)—but it is suggested that, where the question is material to the issue, it should

[1897] 2 Q. B. 124; 66 L. J. Q. B. 572. See *Bishop of Cork* v. *Porter*, (1877) Ir. R. 11 C. L. 94. This rule has no application to interrogatories in actions brought to recover statutory penalties or actions for forfeitures; in these cases it was not the practice before the Judicature Acts, nor is it the practice under the present Rules of Court, to allow interrogatories or discovery: see *Mexborough* v. *Whitwood*, [1897] 2 Q. B. 111; 66 L. J. Q. B. 637; *Martin* v. *Treacher*, (1886) 16 Q. B. D. 507; 55 L. J. Q. B. 209; *Hummings* v. *Williamson*, (1883) 10 Q. B. D. 459; 52 L. J. Q. B. 400. An objection to interrogatories or discovery can therefore be raised in such cases not on oath, and no such interrogatories will be passed by the master.

(*n*) *Swift* v. *Swift*, (1832) 4 Hag. Ecc. 154; *King* v. *King*, (1850) 2 Roberts. 153.

(*o*) Alison, Pract. of Cr. L. 527.

(*p*) *Ante*, § 1355.

(*q*) *R.* v. *Friend*, (1696) 13 How. St. Tr. 16—18; *R.* v. *Ld. G. Gordon*, (1781) 21 *id.* 650.

(*r*) *Maloney* v. *Bartley*, (1812) 3 Camp. 210.

(*s*) *R.* v. *Handcock*, (1841) Ir. Cir. R. 329, per Brady, C.B. For other instances of injustice occasioned by the stringency of this rule, see *Brownsword* v. *Edwards*, (1751) 2 Ves. Sen. 245; *Sharp* v. *Carter*, (1735) 3 P. Wms. 375; *Claridge* v. *Hoare*, (1807) 14 Ves. 59. See also some very sensible observations on this subject in the Law Rev., No. xiii., pp. 19—30.

(*t*) *Cates* v. *Hardacre*, (1811) 3 Taunt. 424; 12 R. R. 678; *Macallum* v. *Turton*, (1828) 2 Y. & J. 183, 195; *Parkhurst* v. *Lowten*, (1816) 2 Swanst. 215; 19 R. R. 63; *Paxton* v. *Douglas*, (1812) 16 Ves. 242; 12 R. R. 175, and 19 Ves. 227, 228; *Harrison* v. *Southcote*, (1751) 1 Atk. 518; *Swift* v. *Swift*, (1832) 4 Hag. Ecc. 154; *King* v. *King*, (1850) 2 Roberts. 153; *M'Mahon* v. *Ellis*, (1859) 10 Ir. C. L. R. 120; *The People* v. *Mather*, (1830) 4 Wend. 229, 252—254; *Southard* v. *Rexford*, (1826) 6 Cowen, 254, 255; *Bellinger* v. *The People*, (1832) 8 Wend. 595.

be left to the discretion of the judge, whether or not he will enforce an answer, having due regard to the general interests of justice.

§ 1455. On several occasions the Legislature has recognised and acted on the principle that answers which have been forced from a witness shall not afterwards be evidence against such witness. Thus, the Larceny Act, 1861, contained a special enactment that nothing therein which relates to frauds committed by bankers, factors, trustees, directors, solicitors, or other agents (*u*), "shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanours in any of the said sections mentioned in that Act mentioned relative to such frauds, by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed (*v*) such act on oath, in consequence of any compulsory (*x*) process of any court of law or equity, in any action, suit, or proceeding, which shall have been *bona fide* instituted by any party aggrieved [or if he shall have first disclosed the same in any compulsory examination or deposition before any court, upon the hearing of any matter in bankruptcy or insolvency] (*y*)." The same statute further enacts that nothing therein shall prevent, lessen, or impeach any remedy, which any party aggrieved by any such fraud may have; but no conviction of any such offender shall be received in evidence in any action against him (*z*). A similar law prevails with respect to persons charged with fraudulently destroying or concealing any title-deed or will (*a*); and somewhat similar clauses are also inserted in the Exhibition Medals Act, 1863 (*b*), in the Merchandise Marks Act, 1887 (*c*), and in the Record of Title

(*u*) 24 & 25 V. c. 96, ss. 75—84. Sections 75 and 76 were repealed by the Larceny Act, 1901 (1 Edw. 7, c. 10), which substituted other provisions. Sections 77—81 and the Larceny Act, 1901, are now repealed by the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). Sections 85 and 86 are not repealed by the Larceny Act, 1916.

(*v*) This word means the discovery of that which was before unknown, and not the statement of that which was before known. *R.* v. *Skeen & Freeman*, (1859) 28 L. J. M. C. 91; 8 Cox C. C. 143.

(*x*) See *R.* v. *Noel*, [1914] 3 K. B. 848; 84 L. J. K. B. 142.

(*y*) S. 85. See *R.* v. *Strahan*, (1855) 7 Cox C. C. 85. By the Bankruptcy Act, 1890 (53 & 54 V. c. 71), the words in brackets were repealed, and in its place it was enacted by section 27 (2) that "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said section 85." See now the Bankruptcy Act, 1914 (4 & 5 G. 5, c. 59), s. 166.

(*z*) S. 86.

(*a*) 24 & 25 V. c. 96, ss. 28, 29.

(*b*) 26 & 27 V. c. 119, s. 5.

(*c*) 50 & 51 V. c. 28, s. 19 (2).

Act, Ireland, 1865 (*d*), as well as in the Acts which have been passed for inquiring into corrupt practices at Parliamentary (*e*) or municipal (*f*) elections, and for regulating the trials of election petitions (*g*). Similar provisions are also found in the Gaming Act, 1845 (*h*), the Gaming Houses Act, 1854 (*i*), and the Explosive Substances Act, 1883 (*k*). So, when Parliamentary inquiries are instituted respecting gaming, and other illegal transactions, where the testimony of many persons implicated is required, Acts of indemnity are occasionally passed, with the view of absolving from punishment or penalty any witness who shall make a faithful discovery of what he knows in relation to the matters under investigation (*l*).

§ 1456. The protection formerly afforded to a person by the rule that no one can be compelled to criminate himself has been taken away by statute from the "printer, publisher or proprietor" of a newspaper in which a libel appears. Every such person, whether in England or Ireland, was in 1836 made compellable (*m*) to answer a bill of discovery as to his connection with any such newspaper, which answer is not to be used in any proceeding other than that for which it is obtained. And the substance of this enactment is still in force (*n*), the High Court now exercising all the powers formerly possessed by Courts of Equity, and an order for an answer to interrogatories would appear to correspond to a decree upon a bill of discovery under the old practice.

(*d*) 28 & 29 V. c. 88, s. 59.

(*e*) See 15 & 16 V. c. 57, s. 8; 17 & 18 V. c. 102, s. 35; 31 & 32 V. c. 125, s. 56. See *R.* v. *Charlesworth*, (1860) 2 F. & F. 326; *R.* v. *Buttle*, (1870) L. R. 1 C. C. R. 248; 39 L. J. M. C. 115; *R.* v. *Slator*, (1881) 8 Q. B. D. 267; 51 L. J. Q. B. 246; *Ex parte Fernandez*, (1861) 10 C. B. (N.S.) 3; 30 L. J. C. P. 321; 128 R. R. 575; *R.* v. *Leatham*, (1861) 3 E. & E. 658; 30 L. J. Q. B. 205; 122 R. R. 882; *R.* v. *Hulme*, (1870) L. R. 5 Q. B. 377; 39 L. J. Q. B. 149; *R.* v. *Holl*, (1881) 7 Q. B. D. 575; 50 L. J. Q. B. 763.

(*f*) 47 & 48 V. c. 70, s. 30.

(*g*) 46 & 47 V. c. 51, s. 59.

(*h*) 8 & 9 V. c. 109, s. 9.

(*i*) 17 & 18 V. c. 38, ss. 5, 6.

(*k*) 46 & 47 V. c. 3, s. 6 (2).

(*l*) See 7 & 8 V. c. 7; and 14 & 15 V. c. 106, both now repealed. Rule 124 (L) of the Rules of Procedure made under section 70 of the Army Act, 1881 (44 & 45 V. c. 58), which provides that "any confession, statement or answer to a question made or given at a Court of Inquiry shall not be admissible in evidence against an officer or soldier," applies only to military tribunals and does not make a statement made at a Court of Inquiry inadmissible in evidence at a criminal trial in a civil court: *R.* v. *Colpus*, [1917] 1 K. B. 574; 86 L. J. K. B. 459.

(*m*) 6 & 7 W. 4, c. 76.

(*n*) The original enactment was contained in a Stamp Act, *viz.*, 6 & 7 W. 4, c. 76, s. 19. By 32 & 33 V. c. 24, s. 1 and Sch. 1, this Act was repealed; but by the same section those provisions of it (among which was a copy of section 19) which were contained in Sch. 2 were re-enacted. See *Carter* v. *Leeds Daily News*, [1876] W. N. 11, where a useful form of interrogatories will be found, although the words "editor or," and "what position does he occupy in respect of the said newspaper," as also the whole of paras. 4 and 5 were struck out by the judge; and recent decisions make Nos. 3 and 6 of them improper. See also Fisher and Strahan's Law of the Press, pp. 152, 153.

§ 1457. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the court will determine, under all the circumstances of the case, as soon as the protection is claimed; but without requiring the witness fully to explain how the effect would be produced; for if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated (*o*). A declaration on oath by a witness that he believes that the answer will tend to criminate him, will, if it appear to the presiding judge that it is under all the circumstances likely to be well founded (*p*), protect him from answering either when in the witness-box or in reply to written interrogatories (*q*). The objection, however, in the case of interrogatories must be taken by way of answer, and not by way of objection to the question (*r*). But the person interrogated must, whether he be in the witness-box or called on to answer interrogatories, actually pledge his oath to such a belief (*s*). Accordingly, when in an action against Cardinal Wiseman for alleged libel, to which he had pleaded not guilty, plaintiff having failed to prove the publication, as a last resource proposed to examine the defendant himself, and the Cardinal, having through his counsel declined to be sworn, the judge ruled that he need not be sworn, a new trial was granted (*t*); and when in an action of trover (*u*) against a dock company for certain pipes of port wine, the defendants alleged that the wine deposited with them was "sour wine," the produce of "rummage sales," and that the wine claimed was "sound port," their theory being that the sour wine had been by some means fraudulently and dishonestly abstracted, and the empty pipes refilled by tapping other stores in the dock, interrogatories to establish this case were allowed (and they would be admissible under the present practice) since plaintiff's oath might show either that the answer to them would tend to criminate him, or else entirely negative the defence set up, but in either view defendants were entitled to have plaintiff's oath. An actual oath to the facts being required, a person will not be protected

(*o*) *The People* v. *Mather*, (1830) 4 Wend. 253, 254 (Am.).

(*p*) *Ex parte Reynolds, re Reynolds*, (1882) 20 Ch. D. 294; 51 L. J. Ch. 756; following, with approval, *R.* v. *Boyes*, (1861) 1 B. & S. 311; 30 L. J. Q. B. 501; 124 R. R. 571; *Osborne* v. *London Dock Co.*, (1855) 10 Ex. 701; 24 L. J. Ex. 140; 102 R. R. 784; *Sidebottom* v. *Adkins*, (1858) 27 L. J. Ch. 152; *Ex parte Fernandez*, *supra*. See *The Mary of Alexandra*, (1868) L. R. 2 A. & E. 319; 38 L. J. Adm. 29. As to former decisions upon this subject, see *R.* v. *Garbett*, (1847) 2 Car. & K. 495; *Fisher* v. *Ronalds*, (1852) 10 C. B. 762; 22 L. J. C. P. 62; *Adams* v. *Lloyd*, (1858) 3 H. & N. 361; 27 L. J. Ex. 499; 117 R. R. 722; *In re Mexican and S. American Co.*, (1859) 4 De Gex & J. 220; 28 L. J. Ch. 769; 124 R. R. 382.

(*q*) *Webb* v. *East*, (1880) 5 Ex. D. 23; 49 L. J. Q. B. 250; *Lamb* v. *Munster*, (1882) 10 Q. B. D. 110; 52 L. J. Q. B. 46.

(*r*) *Fisher* v. *Owen*, (1878) 8 Ch. D. 645; 47 L. J. Ch. 681; *Sammons* v. *Bailey*, (1890) 24 Q. B. D. 727; 59 L. J. Q. B. 342.

(*s*) *Webb* v. *East*, *supra*.

(*t*) *Boyle* v. *Wiseman* (1855) 11 Ex. 360; 24 L. J. Ex. 284; 105 R. R. 562.

by merely "submitting" in his answer to interrogatories (*u*), "that he is not bound to discover" certain matters, because the discovery would expose him to penalties (*v*). The rule appears to apply to the discovery of criminatory documents, equally to the discovery of facts, and the objection must similarly be taken on oath in the affidavit of documents (*x*).

§ 1457A. In all cases where an objection to answer is taken on the ground that the answer may tend to criminate the deponent, the court, as has just been stated, requires to see, from the surrounding circumstances, and from the nature of the evidence sought to be obtained from the witness, that reasonable ground exists for apprehending danger to him from being compelled to answer (*y*). When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of any particular question; for it is obvious that a question, though at first sight apparently innocent, may by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering (*z*). Yet, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules" (*a*); and the court ought at least to have the sanction of an oath as the foundation of the objection. Where, however, the probability of an answer having a tendency to criminate is apparent to the judge, the actual form of words used by the witness in taking the objection is not material so long as it shows that the witness's objection to answer is based on the apprehension that his answer may tend to expose him to a criminal charge (*b*).

§ 1458. If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time (*c*); or if the offence has been pardoned (*d*), or the penalty or forfeiture waived; or if, in any other way, the reason for the privilege has ceased,

(*u*) *Osborn* v. *The London Dock Co.*, (1855) 10 Ex. 698; 24 L. J. Ex. 140; 102 R. R. 784. But see *Tupling* v. *Ward*, (1861) 6 H. & N. 749; 30 L. J. Ex. 222; 123 R. R. 807.

(*v*) *Scott* v. *Miller*, (1859) 1 Johns. 328 (Am.).

(*x*) *Spokes* v. *Grosvenor Hotel Co.*, [1897] 2 Q. B. 124; 66 L. J. Q. B. 572.

(*y*) *In re Genese, ex parte Gilbert*, (1885) 3 Morrell, 223; *R.* v. *Boyes*, (1861) 1 B. & S. 311; 30 L. J. Q. B. 501; 124 R. R. 571. See *Bunn* v. *Bunn*, (1864) 4 De G J. & S 316; 146 R. R. 332.

(*z*) *R.* v. *Boyes*, *supra*.

(*a*) *Vaillant* v. *Dodemead*, (1742) 2 Atk. 524; cited by Lord Eldon in *Parkhurst* v. *Lowten*, (1818) 1 Mer. 401; 15 R. R. 140.

(*b*) *Lamb* v. *Munster*, (1882) 10 Q. B. D. 110; 52 L. J. Q. B. 46.

(*c*) *Roberts* v. *Allatt*, (1828) Moo. & M. 192; *Parkhurst* v. *Lowten*, (1819) 1 Mer. 400; 15 R. R. 140; *The People* v. *Mather*, (1830) 4 Wend. 229, 252—255; *Williams* v. *Farrington*, (1789) 2 Cox, 202; *Davis* v. *Reid*, (1832) 5 Sim. 443.

(*d*) *R.* v. *Boyes*, *supra*. This decision overrules two old cases, *viz.*, *R.* v. *Reading*, (1679) 7 How. St. Tr. 296, and *R.* v. *Shaftesbury*, (1681) 8 *id.* 817.

the privilege itself will cease also, and the witness will be bound to answer (*e*). A witness, too, who has received a pardon under the Great Seal, will thereby lose his privilege, even though he may still, by virtue of the Act of Settlement (*f*), be exposed to the remote contingency of an impeachment by the House of Commons (*g*). It is doubtful whether a witness can object to answer a question on the ground that he is a foreigner, and that his answer will render him liable to be prosecuted in his own country (*h*). This protection, too, has, possibly, not been imported, at least in all its strictness, into the bankruptcy law (*i*); and although a mere witness, when summoned under section 25 of the Bankruptcy Act, 1914, is certainly not bound to answer criminative questions (*k*), the debtor himself may, as it seems, be compelled to do so (*l*), and the answers thus elicited will be admissible against him in any subsequent criminal prosecution (*m*). But it is provided (*n*) that "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in respect of any of the misdemeanours referred to in section 85 of the Larceny Act, 1861" (*o*). A statement of affairs prepared by a debtor in the course of his bankruptcy under the Bankruptcy Act, although compulsory, has been held not to be "a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bank-

(*e*) *R.* v. *Charlesworth*, (1860) 2 F. & F. 326; Wigr. Disc. 83, 84, and cases there cited.

(*f*) 12 & 13 W. 3, c. 2, s. 3.

(*g*) *R.* v. *Boyes*, *supra*.

(*h*) See *King of the Two Sicilies* v. *Willcox*, (1851) 1 Sim. N. S. 301, 329—331; 20 L. J. Ch. 417; 89 R. R. 89; and *U.S.* v. *M'Rae*, (1867) L. R. 3 Ch. 79; 37 L. J. Ch. 129.

(*i*) See *In re Genese*, *ex parte Gilbert*, *supra*. See as to the old law, *R.* v. *Scott*, (1856) 25 L. J. M. C. 128; 7 Cox C. C. 164; recognised by Ld. Campbell in *Goode* v. *Job*, (1851) 1 E. & E. 9; 28 L. J. Q. B. 1; 117 R. R. 113; *R.* v. *Cross*, (1856) Dears. & B. 68; *R.* v. *Robinson*, (1867) L. R. 1 C. C. R. 80; 36 L. J. M. C. 78.

(*k*) 1 *Ex parte Schofield*, *In re Firth*, (1877) 6 Ch. D. 230; 46 L. J. Bk. 112.

(*l*) 4 & 5 G. 5, c. 59, s. 15,—after empowering the court to examine upon oath the debtor as to his conduct, dealings, and property,—goes on to provide, in subsection 8, that the debtor must "answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over either to or by the debtor and signed by him, and may thereafter, save as in this Act provided, be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times." Under section 22, the debtor must also, at the first meeting of creditors, submit, among other things, to "such examination in respect of his property or his creditors," "as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the court by any special order."

(*m*) *R.* v. *Hillam*, (1872) 12 Cox, C. C. 174; *R.* v. *Cherry*, (1871) *id.* 32.

(*n*) 4 & 5 G. 5, c. 59, s. 166. This section reproduces s. 27 (2) of the Bankruptcy Act, 1890 (53 & 54 V. c. 71), which repealed the latter part of section 85 of the Larceny Act, 1861 (24 & 25 V. c. 96).

(*o*) 24 & 25 V. c. 96. See § 1455.

ruptcy," and therefore to be admissible in evidence against him in subsequent criminal proceedings (*p*).

§ 1459. It has been much debated, whether a witness is bound to answer any question, the direct and immediate effect of answering which might be *to degrade his character*. On this subject the law still remains in a somewhat unsettled state, but thus much would seem to be clear; viz., that where the transaction, to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct (*q*). Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the reputation, the liberty, or the life of a fellow-subject, or might at least be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape.

§ 1460. Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the *character*, and consequent *credit*, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such case the witness is not bound to answer (*r*); but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times (*s*). Even Lord Ellenborough,—who is reported to have held on one occasion (*t*), that a witness was not bound to state whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him (*u*),—seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his lordship observed, "If you do not answer the question, I will send you there" (*v*). No doubt cases may arise, where the judge, in the

(*p*) *R.* v. *Pike*, [1902] 1 K. B. 552; 71 L. J. K. B. 287.

(*q*) See *ante*, §§ 1436, 1440.

(*r*) *R.* v. *Cook*, (1696) 13 How. St. Tr. 334, 335; *R.* v. *Freind*, (1696) *id.* 17; *R.* v. *Layer*, (1722) 16 *id.* 161; *R.* v. *O'Coigly*, (1798) 26 *id.* 1351—1353; *Macbride* v. *Macbride*, (1803) 4 Esp. 242; *Dodd* v. *Norris*, (1814) 3 Camp. 519; 14 R. R. 832; *R.* v. *Hodgson*, (1812) R. & R. 211.

(*s*) *Parkhurst* v. *Lowten*, (1816) 1 Mer. 400; 15 R. R. 140; *Cundell* v. *Pratt*, (1827) Moo. & M. 108; *Roberts* v. *Allatt*, (1828) *id.* 192; *R.* v. *Edwards*, (1791) 4. T. R. 440; 2 R. R. 427. See, also, *Harris* v. *Tippett*, and other cases cited *ante*, § 1436, and *R.* v. *Holmes*, and other cases cited *ante*, § 1441.

(*t*) *Millman* v. *Tucker*, (1803) Pea. Add. Cas. 222.

(*u*) *R.* v. *Lewis*, (1803) 4 Esp. 226.

(*v*) *Frost* v. *Holloway*, (1818) cited 1 St. Ev. 197, n. *n*; and 2 Ph. Ev. 428.

exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date, might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So, questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked.

§ 1461. But the rule of protection should not be further extended; for, if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation (*x*); but, on the other hand, it is obviously most important, that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause (*y*).

§ 1462. However the law may be ultimately determined on the point just discussed, it seems to be generally conceded, that where the answer, which the witness may give, will not immediately and certainly show his infamy, but will only indirectly tend to disgrace him, he may be compelled to reply (*z*). With respect, however, to questions which have a tendency to degrade the witness, as involving the fact of his previous bankruptcy, it seems that an objection may perhaps be taken on the ground that such a fact can only in strictness be proved by the production of the record (*a*). Still, in practice it cannot be denied that questions of this nature are very frequently allowed to be put, and where the object is to discredit a witness, he is constantly asked in cross-examination whether he has not been insolvent, or has taken the benefit of the Bankruptcy Act (*b*).

(*x*) 1 St. Ev. 193.

(*y*) *Id.*

(*z*) *Macbride* v. *Macbride*, *supra*; *Parkhurst* v. *Lowten*, *supra*; *The People* v. *Mather*, (1830) 4 Wend. 232, 252, 254; *Cundell* v. *Pratt*, *supra*.

(*a*) *Macdonnell* v. *Evans*, (1852) 21 L. J. C. P. 142; 11 C. B. 935; 87 R. R. 818. But see *Henman* v. *Lester*, (1862) 31 L. J. C. P. 366; 12 C. B. (N.S.) 776; 133 R. R. 506.

(*b*) *Macdonnell* v. *Evans*, *supra*.

§ 1463 (*c*). At one time it was considered doubtful, whether a witness could be compelled to answer, where by so doing he would *subject himself to a civil action or pecuniary loss*, or would *charge himself with a debt*. This question was much discussed in Lord Melville's case; and being finally submitted to the judges, eight of them, with the Chancellor and Lord Eldon, were of opinion that a witness in such case was bound to answer, while four thought that he was not (*d*). To remove the doubts, which such a diversity of opinion threw over the subject, a statute was passed (*e*), declaring "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons."

§ 1464. Though the statute just cited does not in terms refer to the *production of documents*, its spirit seems strictly applicable to such a case; and accordingly it has been held, that a witness cannot be excused from producing papers in his possession, merely because their production may subject him to a civil action, or be otherwise prejudicial to his pecuniary interests (*f*). So a witness or a party to the cause is not bound to produce any documents which may render him liable to punishment, or expose him to penalty or forfeiture (*g*), unless they be of a public nature or such as are directed by statute to be kept (*h*). If, indeed, the documents called for be the title deeds of the witness, or, perhaps, if they be instruments in the nature of title deeds, they will fall within the rule of protection (*i*). A solicitor is entitled to refuse to produce a document entrusted to him by his client if its production would tend to criminate the client (*k*).

§ 1465. In all the cases hitherto put, where the witness is not compellable to answer, or to produce documents, the *privilege is*

(*c*) Gr. Ev. 452, in part.

(*d*) (1806) 29 How. St. Tr. 707.

(*e*) 46 G. 3, c. 37.

(*f*) *Doe* v. *Date*, (1842) 3 Q. B. 609, 618; 11 L. J. Q. B. 220; 61 R. R. 326, per Patteson, J.; *Doe* v. *Ld. Egremont*, (1841) 2 M. & Rob. 386; 62 R. R. 811. These cases appear to overrule *Miles* v. *Dawson*, (1796) 1 Esp. 405, and *Laing* v. *Barclay*, (1821) 3 Stark. 42; 1 L. J. (O.S.) K. B. 135; 25 R. R. 430.

(*g*) *Parkhurst* v. *Lowten*, (1816) 1 Mer. 401; 15 R. R. 140; *Whitaker* v. *Izod*, (1809) 2 Taunt. 115; *R.* v. *Dixon*, (1765) 3 Burr. 1687. But see *R.* v. *Leathem*, (1861) 3 E. & E. 658; 30 L. J. Q. B. 205; 122 R. R. 882.

(*h*) *Bradshaw* v. *Murphy*, (1836) 7 C. & P. 612—(a vestry book kept pursuant to 58 G. 3, c. 69, s. 2).

(*i*) *Doe* v. *Date*, *supra*; *Pickering* v. *Noyes*, (1823) 1 B. & C. 263.

(*k*) *R.* v. *Dixon*, (1765) 3 Burr. 1687.

his, and *not that of the party* (*l*); and, consequently, counsel in the cause will not be permitted to make the objection (*m*). Neither will the witness be allowed to employ counsel of his own to support his claim to protection (*n*). Nor even is the judge bound, as it would seem, to warn the witness of his right to demur to the question (*o*), though, in the exercise of his discretion, he may occasionally deem it proper to do so (*p*). At one time it was thought, that if a witness chose to reply in part, he might be compelled to answer everything relative to the transaction; but this doctrine has been overruled by a majority of the fifteen judges; and it is now finally determined that, after a witness has been sworn, he may claim his protection at any stage of the inquiry, and if he do so, he cannot be forced to answer any additional questions tending to criminate him. In short, he cannot be carried further than he chooses voluntarily to go himself (*q*).

§ 1466. Where a statute required all persons summoned to give evidence before election commissioners to answer truly all questions put to them, and to produce all books and documents relating to the inquiry, and provided that no statement should be admissible in evidence against such witness in any proceeding civil or criminal save a prosecution for perjury for false evidence given before such commissioners, it was held that a document already in existence before the time at which the witness was examined before the commissioners, and referred to by him in the course of that examination, was admissible in evidence against him in subsequent proceedings if otherwise admissible and proved by independent evidence *aliunde*. Protection is not claimable for such a document in such subsequent proceedings merely because its existence was first disclosed in the evidence given by the witness before the commissioners (*r*).

§ 1467. It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be

(*l*) *R.* v. *Kinglake*, (1870) 11 Cox C. C. 499.

(*m*) *Thomas* v. *Newton*, (1826) Moo. & M. 48, n.; *R.* v. *Adey*, (1831) 1 M. & Rob. 94. See *Marston* v. *Downes*, (1834) 1 A. & E. 34; 3 L. J. K. B. 158; and *Doe* v. *Date*, *supra*.

(*n*) *Doe* v. *Ld. Egremont*, *supra*; *Doe* v. *Date*, *supra*.

(*o*) *Att.-Gen.* v. *Radloff*, (1854) 10 Ex. 88; 23 L. J. Ex. 240; 102 R R. 490.

(*p*) *Paxton* v. *Douglas*, (1809) 16 Ves. 242; *Fisher* v. *Ronalds*, (1852) 12 C. B. 764; 22 L. J. C. P. 62; 92 R. R. 873; *R.* v. *Boyes*, (1860) 2 F. & F. 158.

(*q*) *R.* v. *Garbett*, (1847) 1 Den. 236; *King of the Two Sicilies* v. *Willcox*, (1851) 1 Sim. (N.S.) 301, 320, 321; 20 L. J. Ch. 417; 89 R. R. 89. These cases overrule *Dixon* v. *Vale*, (1821) 1 C. & P. 278; *East* v. *Chapman*, (1827) 2 C. & P. 573; and *Ewing* v. *Osbaldiston*, (1834) 6 Sim. 608; and confirm *Ex. p. Cossens*, *re Warrall*, (1820) Buck, 531, 545. See, however, *Chadwick* v. *Chadwick*, (1852) 22 L. J. Ch. 329.

(*r*) *R.* v. *Leathem*, (1861) 3 E. & E. 657; 30 L. J. Q. B. 205; 122 R. R. 882.

drawn from the circumstance (*s*); but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness must be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness (*t*). A perfectly honourable but excitable man may occasionally repudiate a question, which he regards as an insult; and to infer dishonour from his conduct would, of course, be unjust (*u*); but generally speaking, an honest witness will be eager to rescue his character from suspicion, and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory (*v*).

§ 1468. It has before been shown, while treating of evidence excluded from public policy (*x*), that in certain other cases witnesses cannot be *compelled*, and in some they will not be *allowed*, to answer questions put to them; as, for instance, where they are interrogated with respect to privileged communications, secrets of State, and some other subjects. As these matters have been already discussed, it is unnecessary to make any further reference to them in the present chapter, excepting to state as a general rule of law, that a witness cannot object to answer any question, merely because it relates to private matters, or because it is immaterial unless the answer can be withheld on some specific ground of privilege (*y*).

§ 1469. Before leaving the subject of cross-examination, it will be right to allude to the effect on the trial, which would be produced by the death or sickness of the witness between his examination in chief and his cross-examination. This subject was much canvassed in Ireland a few years back, in the case of *R.* v. *Doolin* (*z*), where a witness for the Crown having been suddenly taken ill on cross-examination, the question was, whether the conviction of the prisoner upon his testimony was legal. The majority of the judges held that the conviction was good. In a case which came before Lord Romilly, a witness made an affidavit, and died before she could be cross-examined. Under these circumstances, an objection was taken

(*s*) *Rose* v. *Blakemore*, (1826) Ry. & M. 383; *R.* v. *Watson*, (1817) 2 Stark. 158; *Lloyd* v. *Passingham*, (1809) 16 Ves. 64; *Mallman* v. *Tucker*, (1803) Pea. Add. Cas. 222.

(*t*) See per Bayley, J., in *R.* v. *Watson*, *supra*.

(*u*) 2 Ph. Ev. 429.

(*v*) St. Ev. 197.

(*x*) *Ante*, Part ii., Chap. xvi.

(*y*) *Tippins* v. *Coates*, (1847) 6 Hare, 16; 17 L. J. Ch. 337.

(*z*) (1832) Jebb, C. C. 123.

that the affidavit could not be received in evidence, but the judge thought otherwise, and admitted it at the hearing (*a*).

§ 1470 (*b*). After a witness has been examined in chief, his *credit may be impeached*, not only by means of cross-examination, but in various other modes. First, witnesses may be called to disprove such of the facts stated by him, whether in his direct or cross-examination, as are material to the issue (*c*); next, proof may be given, under certain restrictions as before pointed out (*d*), of statements made by the witness inconsistent with his testimony at the trial; and thirdly, evidence may be adduced reflecting on his *character for veracity* (*e*). But here the evidence must be confined to his general reputation, and will not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared, without notice, to answer the other (*f*). Besides, the mischief of raising collateral issues would itself be a sufficient reason for the adoption of this rule (*g*). The regular mode of examining into the character of the person in question, is to ask the witness whether he knows his general reputation among his neighbours,—what that reputation is,—and whether, from such knowledge, he would believe him upon his oath (*h*).

§ 1471. Whether the inquiry into the general character of a witness shall be restricted to his *reputation for veracity*, or may be made in general terms, *involving his entire moral character* and estimation in society, is a point not yet definitely settled. Still, when it is considered how intimate is the connexion between one crime and another, and moreover, how difficult it may be to find a witness, who can, in strictness, testify as to the character of another for veracity, though that other may, in the language of Sir Charles Wetherell, have been notoriously "guilty of crimes under every letter of the alphabet" (*i*), and be consequently undeserving of the slightest credit,

(*a*) *Davies* v. *Otty*, (1865) 35 Beav. 208; 34 L. J. Ch. 252; 147 R. R. 113; *Elias* v. *Griffith*, (1877) 8 Ch. D. 521; 46 L. J. Ch. 806. But see, *Dunne* v. *English*, (1874) L. R. 18 Eq. 524.

(*b*) Gr. Ev. § 461, in part.

(*c*) As to what are material, see *ante*, § 316, *et seq.* and § 1434, *et seq.*

(*d*) *Ante*, §§ 1426, 1445, 1446

(*e*) See *ante*, § 349, *et seq.*

(*f*) B. N. P. 296, 297; *R.* v. *Rookwood*, (1696) 13 How. St. Tr. 210, per Trevor, Att.-Gen., argu.; *R.* v. *Layer*, (1722) 16 How. St. Tr. 285. See *Carlos* v. *Brook*, (1804) 10 Ves. 49; *Penny* v. *Watts*, (1850) 2 De G. & Sm. 501, 527, 528.

(*g*) *R.* v. *Rookwood*, (1696) 13 How. St. Tr. 211, per Ld. Holt.

(*h*) *R.* v. *Brown*, (1867) L. R. 1 C. C. R. 70; 36 L. J. M. C. 59; *R.* v. *Watson*, (1817) 32 How. St. Tr. 495, 496; *R.* v. *De la Motte*, (1781) 21 How. St. Tr. 811; *Mawson* v. *Hartsink*, (1802) 4 Esp. 103; 6 R. R. 841.

(*i*) *R.* v. *Watson*, (1817) 13 How. St. Tr. 458.

—it certainly appears reasonable that the question as to reputation should be put in the most general form, the opposite party being at liberty to inquire whether, notwithstanding the bad character of the witness in other respects, he has not preserved his reputation for truth. Indeed, one or two English authorities seem to sanction this course (*k*).

§ 1472 (*l*). It is not, however, enough that the impeaching witness should profess merely to state what he has heard "others" say; for those others may be but few. He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only which constitutes his general reputation (*m*). And, in ordinary cases, the witness should himself come from the neighbourhood of the individual whose character is in question; for if he be a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries (*n*). The impeaching witness may, however, be asked in cross-examination the names of the persons whom he has heard speak against the character for veracity of the witness impeached (*o*).

(*k*) *R.* v. *Rookwood*, (1696) 13 How. St. Tr. 211; *Carpenter* v. *Wall*, (1840) 11 A. & E. 803; 9 L. J. Q. B. 217; 52 R. R. 513; *Ld. Stafford's Case*, (1680) 7 How. St. Tr. 1459, 1478; *Sharp* v. *Scoging*, (1817) Holt, N. P. 541. In *Hume* v. *Scott*, (1821) 3 A. K. Marsh. 261 (Am.), Mills, J., observes:—"Every person, conversant with human nature, must be sensible of the kindred nature of the vices to which it is addicted. So true is this, that, to ascertain the existence of one vice of a particular character, is frequently to prove the existence of more at the same time, in the same individual. Add to this, that persons of infamous character may and do frequently exist, who have formed no character as to their lack of truth; and society may have never had the opportunity of ascertaining, that they are false in their words or oaths. At the same time they may be so notoriously guilty of acting falsehood, in frauds, forgeries, and other crimes, as would leave no doubt of their being capable of speaking and swearing it, especially as they may frequently depose falsehood with greater security against detection, than practise those other vices. In such cases, and with such characters, ought the jury to be precluded from drawing inferences unfavourable to their truth as witnesses by excluding their general turpitude? By the character of every individual, that is, by the estimation in which he is held by the society or neighbourhood where he is conversant, his word and his oath is estimated. If that is free from imputation, his testimony weighs well. If it is sullied, in the same proportion his word will be doubted. We conceive it perfectly safe, and most conducive to the purposes of justice, to trust the jury with a full knowledge of the standing of a witness, into whose character an inquiry is made. It will not thence follow, that from minor vices they will draw the conclusion, in every instance, that his oath must be discredited, but only be put on their guard to scrutinise his statements more strictly; while in cases of vile reputation in other respects, they would be warranted in disbelieving him, though he had never been called so often to the book as to fix upon him the reputation of a liar, when on oath."

(*l*) Gr. Ev. § 461, in part.

(*m*) *Boynton* v. *Kellogg*, (1807) 3 Mass. 192; *Wike* v. *Lightner*, (1824) 11 Serg. & R. 198—200; *Kimmel* v. *Kimmel*, (1817) 3 Serg. & R. 337, 338.

(*n*) *Mawson* v. *Hartsink*, *supra*; *Douglass* v. *Tousey*, (1829) 2 Wend. 352.

(*o*) *Bates* v. *Barber*, (1849) 4 Cush. (Mass.) 107.

§ 1473. Where the general reputation of a witness has been thus impeached, the party calling him may *re-establish his credit*, by cross-examining the witnesses, who have spoken against him, as to their means of knowledge and the grounds of their opinion (*p*), or as to their hostile feelings towards the person whose testimony they have discredited (*q*), or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness (*r*), or to attack in their turn the general reputation of the impeaching witnesses (*s*). How far this plan of recrimination may be carried, is not yet formally determined; though the practice is said by some lawyers to be in conformity with the doggerel rule of the civil law,

In testem testes, et in hos, sed non datur ultra;

that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last (*t*).

§ 1474 (*u*). After a witness has been cross-examined, the party who called him has a *right to re-examine him*, and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness (*v*). This point, after having been much discussed in the Queen's case, was again brought before the court several years subsequently, when the learned judges held it to be settled law, that proof, on cross-examination, of a detached statement made by or to a witness at a former time, does not authorise proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved (*x*). Therefore, where a witness has been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not con-

(*p*) *Mawson* v. *Hartsink*, *supra*.
(*q*) *Long* v. *Lamkin*, (1852) 9 Cush. 361, 365.
(*r*) *R.* v. *Murphy*, (1753) 19 How. St. Tr. 724.
(*s*) 2 Ph. Ev. 432.
(*t*) Lord Stafford's trial, (1680) 7 How. St. Tr. 1484.
(*u*) Gr. Ev. § 467, in great part.
(*v*) Such was the opinion of seven out of eight judges in the *Queen's Case*, as delivered by Lord Tenterden, (1820) 2 Br. & B. 297; 22 R. R. 671; *R.* v. *St. George*, (1840) 9 C. & P. 488.
(*x*) *Prince* v. *Samo*, (1838) 7 A. & E. 627; 7 L. J. Q. B. 123; 45 R. R. 783; recognised in *Sturge* v. *Buchanan*, (1839) 10 A. & E. 605; 8 L. J. Q. B. 272; 50 R. R. 509.

nected with the assertions to which the cross-examination related, although they were connected with the subject-matter of the suit (*y*). But if a witness admits on cross-examination, that he has formerly made statements inconsistent with his present testimony, or if that fact be proved by independent evidence, the witness may be asked, on re-examination, to explain his motives for making such inconsistent statements (*z*). If, too, upon cross-examination of a witness, counsel, by referring to what such witness has deposed when on a previous occasion giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he has just given, and did mention the name of the prisoner at present upon his trial (*a*).

§ 1475 (*b*). If the counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given. Thus, where issue was joined upon a plea of prescription to a declaration for trespass in G., and the plaintiff's witnesses were asked, in cross-examination, questions respecting the user in other places than G., which they proved; it was held that the plaintiff, in re-examination, might show an interruption in the user in such other places (*c*). But an adverse witness will not be permitted to obtrude such irrelevant matter in answer to a question not relating to it; and if he should do so, the party cross-examining may apply to have the answer struck out of the judge's notes, after which the witness cannot be re-examined on the subject. If, however, the cross-examining counsel omit to take this course, the re-examination will be allowed (*d*).

§ 1476 (*e*). Where evidence of contradictory statements, or of other improper conduct on the part of a witness, has been either elicited from him on cross-examination, or obtained from other witnesses, with the view of impeaching his veracity,—his *general character* for truth being thus, in some sort, *put in issue*,—it has been deemed reasonable to admit general evidence, that he is a man of strict

(*y*) *Prince* v. *Samo*, *supra*. In this case, the opinion of Lord Tenterden, in the *Queen's Case*, (1820) 2 Br. & B. 298, that evidence of the whole conversation, if connected with the suit, was admissible, though it related to matters not touched in the cross-examination, was considered and overruled.

(*z*) *R.* v. *Woods*, (1840) 1 Crawf. & D., C. C. 439.

(*a*) *R.* v. *Coll*, (1889) 24 L. R. Ir. 522.

(*b*) Gr. Ev. § 468.

(*c*) *Blewett* v. *Tregonning*, (1835) 3 A. & E. 554; 4 L. J. K. B. 234; 42 R. R. 463.

(*d*) *Id.*

(*e*) Gr. Ev. § 469, almost *verbatim*.

integrity and scrupulous regard for truth (*f*). But evidence that he has on other occasions made statements similar to what he has testified in the cause, is not admissible (*g*), unless he be charged with a design to misrepresent, in consequence of his relation to the party, or to the cause; in which case it may be proper to show, that he has made a similar statement before that relation existed (*h*). So, if the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible (*i*). But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to their character (*k*); though if fraud, or other improper conduct, be imputed to any of them, such evidence will then be received (*l*).

§ 1477. The judge has always a discretionary power, with which the court above is very unwilling to interfere (*m*), of *recalling witnesses* at any stage of the trial, and of putting such questions to them as the exigencies of justice require (*n*). He will seldom, however, except under special circumstances, permit a plaintiff, after his case is closed, to recall a witness to prove a material fact (*o*); though the application will in general be entertained, if made before the closing of the plaintiff's case (*p*). So, if it be discovered after a witness has been cross-examined, that his testimony at the trial relative to the subject-matter of the cause differs from some other statement formerly made by him, the court will allow him to be recalled if still within reach, and to be further cross-examined, in order to lay a foundation for impeaching his credit by producing witnesses to contradict him (*q*). If, however, the witness cannot be found, the proof of the other statements must be rejected (*r*). If a question has been omitted in the examination in chief, and cannot, in strictness, be asked on re-examination as not arising out of the

(*f*) *R.* v. *Clarke*, (1817) 2 Stark. 241; *Annesley* v. *Ld. Anglesea*, (1743) 17 How St. Tr. 1348.

(*g*) B. N. P. 294; *R.* v. *Parker*, (1783) 3 Doug. 242, 244; *Anon.*, per Eyre, C.J., cited 2 Ph. Ev. 445; *Berkeley Peer.*, (1811) per Ld. Redesdale, cited *id.* These cases overrule *Lutterell* v. *Reynell*, (1677) 1 Mod. 283.

(*h*) 2 Ph. Ev. 446; 2 Poth. Obl. 251.

(*i*) *Doe* v. *Stephenson*, (1801) 3 Esp. 284; 4 Esp. 50, cited and approved by Ld. Ellenborough in the *Bp. of Durham* v. *Beaumont*, (1808) 1 Camp. 207—210, and in *Provis* v. *Reed*, (1829) 5 Bing. 435; 7 L. J. (O.S.) C. P. 163; 30 R. R. 695; *Doe* v. *Wood*, (about 1828), cited by Burrough, J., 5 Bing. 439.

(*k*) *Bp. of Durham* v. *Beaumont*, *supra*.

(*l*) *Annesley* v. *Ld. Anglesea*, (1743) 17 How. St. Tr. 1348.

(*m*) *Middleton* v. *Barned*, (1849) 4 Ex. 243.

(*n*) *R.* v. *Watson*, (1834) 6 C. & P. 653.

(*o*) *Murray* v. *Sheriffs of Dublin*, (1841) Arm. M. & O. 130; *Johnston* v. *Clinton*, (1841) *id.* 123; *Kelly* v. *Smith*, (1841) *id.* 150; *Bell* v. *Stewart*, (1842) *id.* 401. See *Bevan* v. *M'Mahon*, (1859) 2 Sw. & Tr. 55; 28 L. J. P. & M. 40.

(*p*) *White* v. *Smith*, (1841) Arm. M. & O. 171; *Casson* v. *O'Brien*, (1842) *id.* 263.

(*q*) *The Queen's Case*, (1820) 2 Br. & B. 312, 313; 22 R. R. 685, 686.

(*r*) *Id.*

cross-examination, it is usual for the counsel to request the judge to make inquiry: and such a request is generally granted (*s*).

§ 1478. In former times, when the evidence of witnesses called on opposite sides was directly conflicting, the court would often direct that the witnesses should be *confronted* (*t*). This practice has now fallen into disuse.

(*s*) 2 Ph. Ev. 408.

(*t*) On one remarkable occasion, no less than four witnesses were for this purpose placed together in the box. *Annesley* v. *Ld. Anglesea*, (1743) 17 How. St. Tr. 1350.

CHAPTER IV.

PUBLIC DOCUMENTS.

§ 1479 (*a*). WRITINGS are divisible into two classes, PUBLIC and PRIVATE. The former consists of the acts of public functionaries, in the *Executive*, *Legislative*, and *Judicial* Departments of Government; including, under this general head, the transactions which official persons are required to enter in books or registers, in the course of their public duties, and which occur within the circle of their own personal knowledge and observation (*b*). To the same class may be referred foreign acts of State, and the judgments of foreign courts. In the present chapter it is proposed to treat of all such public documents; and the inquiry will be directed first, to the MEANS OF OBTAINING AN INSPECTION OR COPY of them; secondly, to the METHOD OF PROVING them; and thirdly, to their ADMISSIBILITY AND EFFECT.

§ 1480. In former times it seems to have been considered necessary to obtain the sanction of the Attorney-General, in order to entitle any private person to inspect, or take copies of, the *general records of the realm* (*c*). At the commencement, however, of the reign of Queen Victoria a better system was established, and most of these invaluable documents were placed under the charge and superintendence of the Master of the Rolls. The statute (*d*) by which this alteration was effected, contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them; but it states in the preamble, that "it is expedient to establish one Record Office and a better custody, and to allow the free use of any public records, as far as stands with their safety and integrity, and with the public policy of the realm." It then empowers the Master of the Rolls to make rules "for the admission of such persons as ought to be ad-

(*a*) Gr. Ev. § 470, in great part.

(*b*) The documents kept by the Post Office showing the times of the receipt and delivery of telegrams are not admissible in evidence as public records: *Heyne* v. *Fischell*, (1913) 30 Times R. 190.

(*c*) *Legatt* v. *Tollervey*, (1811) 14 East, 306; 12 R. R. 518; *Doe* v. *Date*, (1842) 3 Q. B. 619; 11 L. J. Q. B. 220; 61 R. R. 326, per Williams, J.

(*d*) 1 & 2 V. c. 94. See, also, The Public Records, Ireland, Act, 1867, 30 & 31 V. c. 70.

mitted to the use of such records," and "to fix the amount of fees, if any," to be paid for such use (*e*); and it proceeds to authorise either the Master of the Rolls, or the Deputy-Keeper of the Records, to allow copies to be made of any of the documents "at the request and cost of any person desirous of procuring the same." The Act further provides that any copy so made shall be examined and certified as a true and authentic copy by the Deputy-Keeper of the Records, or one of the Assistant Record Keepers, and shall be sealed or stamped with the seal of the Record Office and delivered to the party for whose use it was made (*f*). The Act further provides that every copy of a record in the custody of the Master of the Rolls so certified and purporting to be sealed or stamped with the seal of the Record Office, shall be received in evidence in all Courts of Justice, and before all legal tribunals, and before either House of Parliament or any committee of either House, without any further or other proof thereof in every case in which the original record could have been received there as evidence (*g*).

§ 1481. In exercise of the powers vested in him, Lord Langdale directed (*h*), that all the public record offices should be open daily, excepting on Sundays and a few holidays (*i*),—he prescribed a reasonable scale of fees (*k*), which were not chargeable at all to "*literary inquirers*" (*l*), and he instructed the assistant-keepers to give to all applicants every information and assistance in their power, not merely from the calendars and indexes, but also from their own knowledge of records (*m*). In a letter which he wrote to the Premier shortly after the passing of the Act, he thus expressed his sentiments:—"The Records have justly been called the *Muniments of the Kingdom and the People's Evidences;* and they ought to be kept and managed under such arrangements, as may afford to the public the greatest facility of using them that is consistent with their safety. The public ought to have access to them for the purpose of easily obtaining information upon the subjects to which the records relate, and ought to be enabled easily to obtain authentic copies of all documents, which can be adduced as evidence in the establishment or defence of rights, which are at issue in the course of judicial or Parliamentary proceedings" (*n*).

(*e*) 1 & 2 V. c. 94, s. 9; 30 & 31 V. c. 70, s. 17.
(*f*) 1 & 2 V. c. 94, s. 12; 30 & 31 V. c. 70, s. 19.
(*g*) 1 & 2 V. c. 94, s. 13.
(*h*) In 11 Beav xxii. *et seq.*, the rules are set out at length.
(*i*) 2nd Rep. of Dep.-Keeper of Pub. Rec. i., Append. p. 14.
(*k*) *Id.*, p. 15.
(*l*) Letter of Lords of the Treasury, dated 17th Nov., 1851.
(*m*) 2nd Rep. of Dep.-Keeper of Pub. Rec. i., Append. p. 15.
(*n*) Dated Jan. 7, 1839, and cited 1st Rep. of Dep.-Keeper of Pub. Rec., Append. 67.

§ 1482. Lord Romilly, when Master of the Rolls, in 1866, on the opening of the New Search Rooms, abolished all fees whatever for searches and inspections, permitting each searcher to take notes, or even examined copies, of any records, gratis, and retaining only moderate fees for the furnishing of authenticated copies of documents, or for the attendance of clerks as witnesses.

§ 1483. Although, at the present day, the question whether the *public have a strict legal right to inspect these records*, is not likely to be mooted, it would be difficult to establish the right, *except* as to such of the documents as are the *records* of *the superior courts* of law or equity; and even with respect to these, it may be doubtful whether the King's Bench Division of the High Court would interfere by mandamus, unless the applicant was prepared to show that he was interested in the document which he sought to inspect (*o*). Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the court, or of the head of the department under whose control they may be kept, be injurious to the public interests, an inspection would not be granted (*p*).

§ 1484. As one of the principal objects contemplated by the Legislature in passing the Act of 1 & 2 V. c. 94, was the establishment of a general *Record Office*, in lieu of the many repositories which previously existed, a building has been erected on the Rolls' Estate in Fetter-lane, which is applied to that desirable purpose (*q*). To this building all the records, which were formerly deposited in the Tower of London, the Carlton Ride, and the Chapter House at Westminster, and many of those which used to be kept in the Rolls House and Chapel, and in the State Paper Office (*r*), have at length been removed. The Tower which adjoins the Chapter House at Westminster, and which was formerly the prison of the Monastery there, is still, however, the repository for all original Acts of Parliament.

§ 1485. Among the records now under the custody of the Master of the Rolls, may be enumerated the following (*s*):—All the records of the superior courts of common law or equity, which are more than

(*o*) See *R.* v. *Staffordshire* JJ., (1837) 6 A. & E. 99; 6 L. J. M. C. 65; 45 R. R. 412; and *infra*, § 1493.

(*p*) *Ante*, §§ 939, 947.

(*q*) The Public Record Office for Ireland is in Dublin, near the Four Courts.

(*r*) Some of the State Papers of the last half-century are deposited in two houses in Whitehall-yard.

(*s*) For an enumeration of the Public Records in Ireland, see 30 & 31 V. c. 70, s. 4.

twenty years old; the deeds, books, documents, and papers belonging to the suitors in Chancery, which were formerly under the custody of the Masters of that court, and deposited in Southampton Buildings, which were next placed under the special care of the Clerk of Records and Writs (*t*), and which are now in the charge of the Masters of the Supreme Court, and deposited in the Filing and Record Department of the Central Office (*u*); the records, muniments, and writings of the Marshalsea, Palace, and Peveril Courts, which were abolished in 1849 (*v*); the records late in the custody of the King's Remembrancer, including those of the abolished offices of the Pipe, the Lord Treasurer's Remembrancer, the foreign Apposer, the Clerk of the Estreats, the Surveyor of Green Wax, and the Clerk of the Nichils; the records of the Land Revenue Record Office, the Lord Chamberlain's Office, the Augmentation Office, the King's Silver Office, the Alienation Office, and the Chirographer's Office; records of the Admiralty Courts; the log-books of the navy; various branches of the correspondence and documents of the Admiralty and Navy Boards; many of the papers of the War Office; the charity commission papers; various records of forfeited estates; the French claim commission papers; duplicates of land and assessed taxes; population returns; some records relating to the land revenue (*x*); many of the equity records of the Welsh courts; the fines and recoveries, and other records of the Chester circuit; the records of the Court of Wards and Liveries; some of the proceedings in the Star Chamber and the Court of Chivalry; the placita forestæ; the Pell records; the records of first fruits and tenths; Domesday Book; Parliament rolls; statute rolls; patent rolls; close rolls; some of the surveys of lands which formerly belonged to the Crown; lieger-books and chartularies of the dissolved monasteries, priories, &c.; and some very valuable Home, Foreign, Colonial, and Treasury Papers (*y*). The legal reader will observe that very many of the documents here alluded to are not strictly records; but this circumstance is rendered immaterial by the Act of 1 & 2 V. c. 94, which provides that the word "records" in that Act shall be taken to mean all rolls, records,

(*t*) 23 & 24 V. c. 149, s. 9; Gen. Ord. in Ch., 22nd May, 1866. This office was abolished in 1879, by 42 & 43 V. c. 78, Sched. I.

(*u*) R. S. C., Ord. LX., R. 3; Ord. LXI., R. 1.

(*v*) 12 & 13 V. c. 101, ss. 14, 16.

(*x*) As to remainder, see *post* § 1486.

(*y*) This list is compiled from the annual reports of the Dep.-Keeper of the public records, and, although not offered as anything like a complete list, it is believed to be accurate so far as it goes. Besides the documents enumerated above, there are, at the Record Office, a vast quantity of curious miscellaneous manuscripts, minute books, indices, calendars, &c., which were either collected by the late Record Commission, or by persons employed in the Record Office, together with many important transcripts from the royal or public archives of France, Normandy, Belginm, Saxony, Prussia, Bavaria, Hamburgh, Portugal, Switzerland, and Italy. But all these are merely deposited for convenience with the M.R., and are not in official custody under the Act.

writs, books, proceedings, decrees, bills, warrants, accounts, papers, and documents whatsoever of a public nature, belonging to her Majesty, or, on the 14th of August, 1838, deposited in any of the offices or places of custody in the Act mentioned (*z*).

§ 1486. In addition to the records, which are now placed under the control of the Master of the Rolls, there are many *other documents of a public character* the *custody* of which belongs to *particular courts and offices*. Among these may be enumerated the records of the Duchy of Lancaster, which are at present deposited in Lancaster Place, adjoining Waterloo Bridge; the records of the Duchy of Cornwall, the repository for which is at Buckingham Gate; the records of the Heralds' College (*a*), most of which will be found either in the College itself at St. Bennet's Hill, St. Paul's, or in the Harleian Library; some of the land revenue records, which parties interested may inspect at the "Office of land revenue records and inrolments" in Spring Gardens (*b*); the records of baptisms, marriages, and burials in India (*c*), which are deposited in Charles Street, St. James's Park, at the office of the Secretary of State for India in Council; and the registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, and which are now placed in the registry of the Consistory Court of London (*d*).

(*z*) See sections 20, and 1 and 2. See also 30 & 31 V. c. 70, ss. 3, 5; and 38 & 39 V. c. 59. Under this last Act many parochial records have been transferred to the Irish Record Office.

(*a*) As to these, see Hubb. Ev. of Suc. 538—566.

(*b*) See 2 W. 4, c. 1, ss. 15, 20, 22. Many of these records are in the Record Office, *ante*, § 1485. The audited accounts of the Commiss. of Woods and Forests are now deposited as of record in the Land Revenue Office, 7 & 8 V. c. 89.

(*c*) In Bengal, from 1713 to 1737; at Madras, from 1698 to 1834; in Bombay, from 1709 to 1837; and at St. Helena, from 1767 to 1835. See p. 13 of Rep. of Commiss., appointed to make inquiries respecting non-parochial registers, published 1838.

(*d*) "These registers were first received in the registry of the Consist. Court of London, in 1816, and may be divided into three classes:—1. Certificates of baptisms and marriages, bearing the signatures of the parties and witnesses (which, with very few exceptions, is the case) and authenticated by the British envoy or minister, as having been performed in his house, and which have from time to time been sent through the Foreign Office to the registry of the Bp. of London. In this class may be included the registers from Oporto from 1706 to 1802, and the registers from the Cape of Good Hope, Gibraltar, and Geneva. These are the original books, in which the entries are signed by the parties, and authenticated by the chaplains. 2. Transcripts from original registers, certified by the ministers of the different places, in the same manner as the transcripts under the Act of 52 G. 3, c. 146, for the regulation of transcripts deposited with the registrars of the several dioceses. A book of transcripts also from the register kept at the British Embassy in Paris, from 1816 to 1833, and continued to the present time; and a transcript of the registers of St. Petersburg from 1706 to the present time. 3. A book of registers, transmitted from Cronstadt, which appear to have been transcribed, but they are not certified as such."—P. 11 of Rep. of Commiss., cited in last note.

§ 1487. The Act which, in 1857, established the Court of Probate, —now transmuted into the Probate Division of the High Court,— contains several important provisions with respect to the custody and inspection of original wills, and the inspection of the calendars of the grants of probate and administration. In the first place, all persons who heretofore either had jurisdiction to grant probate or administration, or had the custody of the papers of any old Court of Probate, are directed, upon receiving a requisition under the seal of the Court from a registrar, to transmit to the place specified in such requisition, "all [or one or more (*e*)] records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be of easy reference, under the control and direction of the Court" (*f*). The statute also enacts, that "there shall be one place of deposit under the control of the Court (*g*), "in which all the original wills brought into the Court, or of which probate or administration with the will annexed is granted under this Act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected, under the control of the court, and subject to the rules and orders under this Act" (*h*). Lastly, the Judge of the court is directed to cause calendars of the grants of probate and administration to be made and printed from time to time, and copies of these calendars are to be deposited in the district registries, the office of his Majesty's Prerogative in Dublin, the office of the commissary of the county of Midlothian in Edinburgh, and such other offices as the court may order, "and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected" (*i*).

§ 1488 (*k*). With respect to the *Records of the King's Courts*, it has been admitted, from a very early period, that the *inspection* and *exemplification* of these documents are the *common right of the*

(*e*) This amendment was introduced into the Eng. Act by section 27 of 21 & 22 V. c. 95.

(*f*) 20 & 21 V. c. 77, s. 89; 20 & 21 V. c. 79, s. 96, Ir.

(*g*) This place was formerly at No. 6, Great Knightrider Street, Doctors' Commons. See *Gazette* of 4th Dec., 1857. But by requisition made under the Act (no Order in Council appears to have been made on this occasion), all old wills have been removed to, and now are at, the Registry of the Probate Division at Somerset House.

(*h*) 20 & 21 V. c. 77, s. 66; 20 & 21 V. c. 79, s. 71, Ir.

(*i*) 20 & 21 V. c. 77, ss. 67, 68. See also 20 & 21 V. c. 79, ss. 72, 73, Ir.

(*k*) Gr. Ev. § 470, in part, as to first five lines.

public; and this right was extended by an ancient ordinance or statute (*l*) to cases where the subject was concerned against the Crown. That statute, however, was repealed in 1871 (*m*); and as the common law on which it was partly founded, simply relates to such records as are required by the subject for the purpose of being given in evidence, a prisoner who is charged either with high treason or felony, is certainly not entitled,—except by statute,—to a copy of the indictment or of any of the proceedings against him (*n*). In most cases of treason, indeed, the accused must now be supplied, ten clear days before his trial, with a copy of the indictment, but this privilege is allowed him in consequence of statutes having been passed for that purpose in the reigns of King William III. (*o*) and Queen Anne (*p*). And now, by the Indictments act, 1915, in every case the accused person is entitled to a copy of the indictment free of charge (*q*). With respect to the depositions upon which a prisoner has been committed or held to bail, preparatory to his being tried for some indictable crime (*r*), he is now entitled by statute, not only to inspect them at the trial without fee (*s*), but also to obtain copies of them on payment of a small sum, whatever be the nature of the offence imputed (*t*).

(*l*) 46 Ed. 3.

(*m*) St. L. Rev. Act, 1871, 34 & 35 V. c. 116.

(*n*) *R.* v. *Ld. Preston*, (1791) 12 How. St. Tr. 658—663; Foster. C. L. 228, 229.

(*o*) 7 W. 3, c. 3, s. 1.

(*p*) 7 A. c. 21, s. 11, which enacts, that copies of all indictments for high treason and misprision of treason, "shall be delivered to the party indicted ten days before the trial, and in presence of two or more credible witnesses." This enactment is extended to Ireland by the Act of 17 & 18 V. c. 26.

(*q*) 5 & 6 G. 5, c. 90, Sch. rule 13.

(*r*) A person who has been committed for want of sureties to keep the peace cannot demand a copy of the examinations on which the commitment proceeded; *Ex parte Humphrys*, (1850) 19 L. J. M. C. 189.

(*s*) 6 & 7 W. 4, c. 114, s. 4, enacts that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

(*t*) 11 & 12 V. c. 42, s. 27, enacts that "at any time *after* the examinations aforesaid shall have been completed, and *before* the first day of the assizes or sessions, or other first sitting of the court, at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require and be entitled to have of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words." See also the Coroners Act, 1887 (50 & 51 V. c. 71), s. 18 (5), which enacts that "a person charged by an inquisition with murder or manslaughter shall be entitled to have, from the person having for the time being the custody of the inquisition, or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words." The Irish law is regulated by section 14 of 14 & 15 V. c. 93, which enacts, that "at any time after the examinations in any proceedings for an indictable offence shall have been completed, and on or before the first day of the assizes or sessions, or other first sitting of the court at which any person committed to gaol or admitted to bail is to be tried, such person may require and shall be entitled to receive from the officer or person having the custody of the

§ 1489. It has been doubted whether a person *tried for felony and acquitted is entitled to a copy of the record* of his acquittal, for the purpose of giving it in evidence in an action for *malicious prosecution* (*u*). This doubt has arisen in consequence of an order made by five judges in the reign of Charles II., for the regulation of the Sessions at the Old Bailey; and which directs that "no copies of any indictment for felony be given without special order upon motion made in open court, at the general gaol delivery upon motion (*v*); for the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the King upon just occasions" (*x*). Now, it is certainly difficult, if not impossible, to establish the legality of this order; for not only does it appear to be directly at variance with the Act of 46 Edward III., —which, as stated just now in § 1488, was then in force,—but it seems also to be wholly inconsistent with the provisions of Magna Charta, "nulli negabimus vel differemus justitiam." Accordingly, in the case of a prosecution for robbery, evidently vaxatious, where the prisoner, after his acquittal, applied to Chief Justice Willes for a copy of the indictment, his Lordship refused to make an order on the subject, on the ground that none was necessary; declaring that by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right to a copy of the record of such acquittal, for any use he might think fit to make of it; and that, after a demand of it had been made, the proper officer might be punished for refusing to make it out (*y*).

§ 1490. This statement of the law would seem to be substantially correct, and if so, the order of the judges, confirmed though it be by a decision of Lord Holt (*z*), is illegal (*a*); but, be this as it may, thus much may be safely affirmed; first, that the order does not extend to misdemeanours, but that in such cases the prisoner has an absolute right to a copy of the indictment on which he has been either acquitted or convicted (*b*); secondly, that even in cases of felony, where the

same, copies of the depositions on which he shall have been committed or bailed (or copies of depositions taken at any inquest in case of murder or manslaughter), on payment of a reasonable sum for the same, not exceeding a sum at the rate of three halfpence for each folio of ninety words." See also 44 & 45 V. c. 35, s. 9.

(*u*) *Browne* v. *Cumming*, (1829) 10 B. & C. 70; 8 L. J. (O.S.) K. B. 89. See *R.* v. *Dunne*, (1838) Ir. Cir. R. 407, where a prisoner having been convicted, the court refused to allow him a copy of the depositions of a Crown witness, for the purpose of assigning perjury upon them.

(*v*) *Sic.*

(*x*) 7th Res., cited in Kel. 3. The five judges were Hyde, C.J., O. Bridgman, C.J., Twisden, Tyril, and Kelyng, Js.

(*y*) *R.* v. *Brangan*, (1742) 1 Lea. 27. See also *Doe* v. *Date*, (1842) 3 Q. B. 619; 11 L. J. Q. B. 220; 61 R. R. 326.

(*z*) *Groenvelt* v. *Burrell*, (1697) 1 Ld. Ray. 253.

(*a*) Lord Ellenborough, however, treated it as valid in *Legatt* v. *Tollervey*, (1811) 14 East, 301; 12 R. R. 518.

(*b*) *Morrison* v. *Kelly*, (1762) 1 W. Bl. 385; *Evans* v. *Phillips*, (1763) 2 Selw. N. P. 1072, 8th ed.

party acquitted brings an action for malicious prosecution, the judge at Nisi Prius is bound to receive in evidence a true copy of the indictment, though proved to have been obtained without an order (*c*); and lastly, that, for the purpose of pleading *autrefois acquit*, or *autrefois convict*, the prisoner is entitled to have a copy of the former record, whatever be the nature of the accusation; and if the court where he was first tried refuses to grant him one, the King's Bench Division of the High Court will enforce his right by mandamus (*d*).

§ 1490A. Under the Army Act, 1881, any person tried by court-martial is entitled, on demand, in the case of a general court-martial within seven years, and of any other court-martial within three years, after the confirmation of the sentence, to obtain from the officer having custody of the proceedings a copy of the same, including those with respect to the confirmation, upon payment for the same at the prescribed rate, not exceeding twopence for every seventy-two words (*e*).

§ 1491. Independently of the general law which governs the right to inspect and take copies of the records of courts of justice, the Bankruptcy Act (*f*) and Rules contain several special regulations on the subject. Thus, R. 12, after declaring that "all proceedings of the court shall remain of record in the court," goes on to provide, that "they may at all reasonable times be inspected by the trustee, the debtor, and any creditor who has proved, or any person on behalf of the trustee, debtor, or any such creditor." R. 16 next provides, that, "all office copies of petitions, proceedings, affidavits, books, papers, and writings, or any parts thereof, required by any trustee, or by any debtor, or by any creditor, or by the solicitor of any such trustee, debtor or creditor, shall be provided in the High Court by the Senior Bankruptcy Registrar, and in a County Court by the Registrar," without any unnecessary delay, and in the order in which they shall have been bespoken. Then section 14, sub-section 4, of the Act, which authorises any person, stating himself in writing to be a creditor, at all reasonable times, personally or by agent, to inspect, or take any copy of, or extract from, the debtor's statement of affairs, which has been submitted to the Official Receiver. Again, after the debtor has been publicly examined by the court, the note of his examination may, under section 15, sub-section 8, be inspected by any creditor at all reasonable times. Every creditor, too, who has lodged a proof of his claim, is entitled at all reasonable times, and

(*c*) *Legatt* v. *Tollervey*, *supra*; *Jordan* v. *Lewis*, (1739) *id.* 305. n.

(*d*) *R.* v. *Middlesex J.J.*, *In re Bowman*, (1834) 5 B. & Ad. 1113; 3 L. J. M. C. 32; 39 R. R. 736.

(*e*) 44 & 45 V. c. 58, s. 124.

(*f*) 4 & 5 G. 5, c. 59.

even before the first meeting, to examine the proofs of the other creditors (*g*). The audited accounts of the trustees, copies of which are filed with the court, are "open to the inspection of any creditor, or of the bankrupt, or of any person interested" (*h*); and all books kept by the trustees may, subject to the control of the court, be inspected by any creditor or by his agent (*i*). The trustee must also, when required by any creditor, and on payment of the proper fee, transmit to him by post a list of the creditors, showing the debt due to each creditor (*k*).

§ 1491A. The Rules of the Supreme Court, 1883, contain several provisions for facilitating the inspection of the numerous and varied documents, which are now deposited in the Central Office of the Royal Courts of Justice (*l*). The most important of these rules are

(*g*) Sch. II. of the Act, r. 7.
(*h*) Section 92, sub-s. 4.
(*i*) Section 86.
(*k*) Section 84.
(*l*) It may here be convenient to specify the several departments of this important office, and the nature of the documents filed in each department. Order LXI. r. 1, provides as follows:—"The Central Office shall, for the convenient dispatch of business, be divided into the Departments specified in the first column of the following scheme, and the business of the office shall be distributed among the departments in accordance with that scheme, and shall be performed by the several officers and clerks in the said office who are now charged with the same or similar duties, and by such others as may from time to time be appointed by lawful authority for that purpose.

SCHEME.

Name of Department.	Business.
1. Writ, appearance, and judgment.	The sealing and issue of writs of summons for the commencement of actions. The entry in the cause book of writs of summons, appearances, and judgments. The sealing and issue of notices for service under Ord. XVI., r. 48. The receipt and filing of pleadings and notices delivered on entry of judgment. The transaction of all business heretofore conducted in the Record and Writ Office, except such part thereof as is transacted in the Record Department. The custody of all deeds and documents ordered to be left with the Masters. The business heretofore performed in the Report Office under the direction and control of the Clerks of Records and Writs.
2. Summons and Order . .	The issue of summonses in the King's Bench Division, and the drawing up of all orders made either in court or in chambers in that division.
3. Filing and Record . .	The filing of all affidavits to be filed in the Central Office, and all depositions to be used in the Chancery Division, and such

contained in Order LXI. Rule 17 provides, that "proper indexes or calendars to the files or bundles of all documents filed at the Central Office shall be kept, so that the same may be conveniently referred to when required; and such indexes or calendars and documents, shall, at all times during office hours, be accessible to the public on payment of the usual fee."

Rule 18 provides, that "there shall also be entered in proper books kept for the purpose the time when any certificate is delivered at the Central Office to be filed, with the name of the cause and the date of the certificate; and the like entry shall be made of the time of delivery of every other document filed at the Central Office; and such books shall, at all times during office hours, be accessible to the public on payment of the usual fee."

Then comes Rule 23, which provides, that "the Clerk of Enrolments and each of the following Registrars, namely—

(a.) The Registrar of Bills of Sale;

(b.) The Registrar of Certificates of Acknowledgments of Deeds by Married Women;

(c.) The Registrar of Judgments (*n*);

shall, on a request in writing giving sufficient particulars, and on payment of the prescribed fee, cause a search to be made in the registers or indexes under his custody, and issue a certificate of the result of the search."

SCHEME—*continued*.

Name of Department.	Business.
3. Filing and Record (*continued*).	other documents as may from time to time be directed by the Masters to be filed, and the making and examination of office copies of documents filed in the department.
4. Taxing	The taxation of costs.
5. Enrolment	The business heretofore performed in the Enrolment Office.
6. Judgments and married women's acknowledgments	The registry of acknowledgments of deeds by married women.
7. Bills of Sale	The registry of bills of sale and other duties connected therewith.
8. King's Remembrancer	The business heretofore performed in the King's Remembrancer's Office.
9. Crown Office	The business heretofore performed in the Crown Office.
10. Associates	The business heretofore performed in the Associates' Offices."

(*n*) By the Land Charges Act, 1900 (63 & 64 V. c. 26), s. 1 (1), and the order of the Lord Chancellor of 3rd August, 1900, the business of the Registrar of Judgments has been transferred to the office of the Land Registry, 33, Lincoln's Inn Fields.

Rule 24 states, that "for the purpose of enabling all persons to obtain precise information as to the state of any cause or matter, and to take the means of preventing improper delay in the progress thereof, the proper officer shall, at the request of any person, whether a party or not to the cause or matter inquired after, but on payment of the usual fee, give a certificate specifying therein the dates and general description of the several proceedings which have been taken in such cause or matter in the Central Office."

§ 1491B. Independently of the Rules just cited, every person is entitled by statutory authority to inspect, on payment of a small sum, the *warrants of attorney* to confess judgment, the *cognovits actionem*, the *judge's orders* to enter up judgment by consent, and the *bills of sale* of personal chattels, which must now be filed or registered in the Bills of Sale Department of the Central Office (*o*), —the first three classes of documents within twenty-one days, the last within seven days, after their respective execution or making; as also the books and indexes relating to these documents, which the proper officer of the Central Office is directed to keep (*p*). When a bill of sale has been given by a person residing "outside the London bankruptcy district," or whose chattels are outside such district, an abstract of the contents of such bill of sale must be transmitted from the Central Office to the local County Court Registrar, who must file and index the same; and "any person may search, inspect, make extracts from, and obtain copies of, the abstract so registered" (*q*).

§ 1491C. Again, all persons are, by statute, at liberty, on payment of the authorised fee (*r*), to search the book kept at the Land Registry Office; and which contains a list of the persons whose real estate is intended to be affected by the judgments, decrees, orders, or rules of the courts, or by orders in lunacy.

§ 1492 (*s*). It is highly questionable whether the *records of inferior tribunals* are open to the inspection of all persons without distinction (*t*); but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individu-

(*o*) Ord. LXI., r. 1.

(*p*) 3 G. 4, c. 39, ss. 5, 6; 6 & 7 V. c. 66; 32 & 33 V. c. 62, ss. 26—28; 41 & 42 V. c. 31, s. 12; 45 & 46 V. c. 43, s. 16. See, also, 46 & 47 V. c. 7, s. 16.

(*q*) 45 & 46 V. c. 43, s. 11; 46 & 47 V. c. 7, s. 11. In Ireland the abstract is sent to the local clerk of the peace.

(*r*) The fees are fixed by the Order of the Lord Chancellor made under the Land Charges Act, 1900, and dated 8th August, 1900.

(*s*) Gr. Ev. § 473, in some part.

(*t*) *R.* v. *Chester*, (1819) 1 Chit. 297, 299, per Abbott, C.J., questioning *Herbert* v. *Ashburner*, (1750) 1 Wills. 297.

ally interested. The party, therefore, who wishes to examine any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose (*u*). If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action (*v*). So, where a party, who had been sued in a court of conscience (*x*) and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself (*y*).

§ 1493. Indeed, it may be laid down as a general rule, that the King's Bench Division will *enforce by mandamus the production of every document of a public nature*, in which any one of his Majesty's subjects can prove himself to be *interested* (*z*). Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,—without putting them to the expense and trouble of making a formal application for a mandamus (*a*). But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is *bonâ fide* required on some special and public ground (*b*), or the court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced (*c*).

(*u*) See *R.* v. *Wilts. & Berks. Canal Co.*, (1835) 3 A. & E. 47; 42 R. R. 445; *R.* v. *Leicester JJ.*, (1825) 4 B. & C. 892.

(*v*) *R.* v. *Midlam*, (1765) 3 Burr. 1720—1722.

(*x*) "Courts of Conscience" were tribunals for the recovery of small debts constituted by Act of Parliament in the City of London, and other towns, now superseded by the County Courts.

(*y*) *Wilson* v. *Rogers*, (1746) 2 Str. 1242.

(*z*) *R. v. Staffordshire JJ.*, (1837) 6 A. & E. 100; 6 L. J. M. C. 65; 45 R. R. 412, per Ld. Denman.

(*a*) *R.* v. *Staffordshire JJ.*, *supra.*

(*b*) *Ex parte Briggs*, (1859) 28 L. J. Q. B. 272; 1 E. & E. 881; 117 R. R. 501.

(*c*) *R.* v. *Staffordshire JJ.*, *supra.*

Thus, the ratepayers of a county are not entitled to inspect and copy the bills of charges of county officers, which, having been paid by the treasurer under orders of justices, have become items in his accounts, and which have been allowed by the sessions, and deposited by the clerk of the peace among the county records (*d*). For in such case, the individual ratepayers would have no power to interfere, even though they might prove to demonstration that the bills had been improperly paid and allowed.

§ 1494 (*e*). Some other books and documents partake *both of a public and private character,* and are treated as the one or the other according to the relation in which the applicant stands to them. Thus, a stranger has no right to an inspection of the *rolls of copyhold courts* and of courts baron (*f*); but the copyhold tenants of a manor are clearly entitled to inspect and take copies of such parts, though of such parts only (*g*), of the court rolls, as relate to their own titles, privileges, or interests; and this, too, whether an action be pending or not (*h*). Indeed, by a general rule of court (*i*), it is determined, that "an order upon the lord of a manor to allow limited inspection of the court rolls, may be made on the application of a copyhold tenant, supported by an affidavit that he has applied for inspection, and that the same has been refused." It has been held, that this last rule is not strictly confined to cases where the applicant is a copyhold tenant; but if he has a *primâ facie* title to a copyhold (*k*), or is otherwise interested in copyhold property (*l*), as, for instance, if he is the devisee of a rent-charge on such property (*m*), the court will make the order. Even a freehold tenant of a manor has a right to inspect the court rolls (*n*); though it may, perhaps, be doubtful, whether he must not first show that some suit is actually depending (*o*).

(*d*) *Id.* 84; overruling *R.* v. *Leicester JJ., supra.* See, also, *R.* v. *Marylebone*, (1836) 5 A. & E. 268; 6 L. J. M. C. 159.

(*e*) Gr. Ev. § 474, as to first three lines.

(*f*) *Crew* v. *Saunders*, (1735) 2 Str. 1005; *R.* v. *Shelley*, (1789) 3 T. R. 142, per Buller, J.

(*g*) *R.* v. *Merchant Taylor's Co.*, (1831) 2 B. & Ad. 128, 129; L. J. (O.S.) K. B. 146; 36 R. R. 503.

(*h*) *R.* v. *Tower*, (1815) 4 M. & S. 162; 16 R. R. 428; *R.* v. *Lucas*, (1808) 10 East, 235; 10 R. R. 283.

(*i*) Ord. XXXI., R. 19.

(*k*) *R.* v. *Lucas*, *supra.*

(*l*) *Ex parte Hutt*, (1839) 7 Dowl. 690.

(*m*) *Ex parte Barnes*, (1833) 2 Dowl. N. S. 20.

(*n*) *Addington* v. *Clode*, (1775) 2 W. Bl. 1030; *Hobson* v. *Parker*, (1754) Barnes, 237, cited by Buller, J., in 3 T. R. 142; *Warrick* v. *Queen's College, Oxford*, (1867) L. R. 3 Eq. 683; 36 L. J. Ch. 505. But see *Owen* v. *Wynn*, (1878) 9 Ch. D. 29.

(*o*) *R.* v. *Allgood*, (1798) 7 T. R. 746; 4 R. R. 574. But see *R.* v. *Lucas* and *R.* v. *Tower*, *supra.*

§ 1495. Again, the *books of a corporation* are, at common law (*p*), regarded as public to a certain extent with respect to its members, but private with respect to strangers. Thus, on the application of a member, the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation (*q*), provided it be shown that such inspection is requisite with reference either to an action then instituted, or at least to some specific dispute or question depending, in which the applicant is interested (*r*); but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion (*s*). The rule appears to have been sometimes laid down more broadly, and the language ascribed to the court in one or two cases would almost lead to the inference, that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body (*t*). But this doctrine is now properly exploded; the privilege of inspection being confined to those cases in which the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object (*u*). For instance, where certain members of a corporation applied for a mandamus to the master and wardens to allow them to inspect all the documents of the corporation, alleging their belief that its affairs were improperly conducted, and complaining of misgovernment in some particulars not affecting themselves, nor then in dispute, the court held that the applicants had no right on these speculative grounds to the inspection prayed, and discharged the rule (*v*). So, where some parties were sued by an incorporated company for alleged misconduct in making false entries in the books of the corporation, while acting in the capacity of directors, the court held that they were not entitled to a general inspection of the company's books, at least without an affidavit that such inspection was necessary for their defence (*x*). In another case, where a shareholder, sued for calls, applied to the court for a rule to inspect the minute-books of the company, and of the meetings of the directors, "particularly with respect to the calls" in question, the application was rejected, as it appeared to

(*p*) As to the Stat. Law, see *post*, §§ 1504—1507.

(*q*) *R.* v. *Beverley*, (1839) 8 Dowl. 140.

(*r*) *R.* v. *Merchant Taylor's Co.*, *supra*; *In re Burton and the Saddler's Co.*, (1862) 31 L. J. Q. B. 62; 136 R. R. 841.

(*s*) *Id.*

(*t*) *R.* v. *Hostmen of Newcastle*, (1745) 2 Str. 1223; *R.* v. *Babb*, (1790) 3 T. R. 581.

(*u*) *R.* v. *Merchant Taylors' Co.*, (1831) 2 B. & Ad. 115; 9 L. J. (O. S.) K. B. 146. 36 R. R. 503.

(*v*) *Id.*

(*x*) *Imperial Gas Co.* v. *Clarke*, (1830) 7 Bing. 95; 9 L. J. (O.S.) C. P. 28.

have been made for the purpose, not of assisting the defendant to plead a particular plea, but of enabling him to fish out a defence (*y*).

§ 1496. The right of inspection which the members of a corporation enjoy being thus limited, it is only just that this right should be still more restricted in the case of *persons who are not members;* and, accordingly, unless the documents sought to be inspected contain the common evidence of some transaction between the corporation and a stranger, or at least furnish the rule by which the stranger is sought to be bound, he has no right to inspect them, even though he be a defendant in a suit brought by the corporation. Thus, if a corporation were to bring an action against a stranger for tolls, the courts could not grant the defendant leave to inspect the corporation muniments (*z*). But, if an action were brought against a party residing in a borough, for the breach of a by-law restraining persons, not freemen, from exercising trades within the limits, the court would compel the corporation to allow the defendant to inspect the by-law, because it must be taken to have been made for the public weal, and for the rule and government of persons dwelling within the borough (*a*).

§ 1497. The rules just mentioned apply with equal force to *parish books.* Thus, parishioners have a right to inspect them for ordinary parochial purposes, as, for instance, if a dispute be pending respecting the validity of a rate (*b*), or the like; but they are not, as it seems, entitled to have access to them for purposes unconnected with the affairs of the parish (*c*). Thus, access to parish books has been refused to a parishioner, who, being sued for a libel upon the vestry clerk, sought to inspect the books, for the purpose of enabling him to plead a justification (*d*). So, a parishioner has no right to inspect parish books, for the mere purpose of obtaining information to support his claim to an estate in the parish (*e*). Moreover, strangers have, as a general rule, no right to an inspection at all; and so strictly was this rule once enforced, that where a party brought an action of trespass against parish-officers, for entering his house to distrain for

(*y*) *Birmingham, Bristol and Thames Junction Ry.* v. *White*, (1841) 1 Q. B. 282; 10 L. J. Q. B. 121.

(*z*) *Mayor of Southampton* v. *Graves*, (1800) 8 T. R. 590; 5 R. R. 480; overruling *Mayor of Lynn* v. *Denton*, (1787) 1 T. R. 689; 1 R. R. 359; and *Barnstable* v. *Lathey*, (1789) 3 T. R. 303; *Bolton* v. *Corporation of Liverpool*, (1831) 1 Myl. & K. 88; 1 L. J. Ch. 166; 36 R. R. 251; recognised in *Nias* v. *North. and East. Ry.*, (1838) 3 Myl. & Cr. 357; 7 L. J. Ch 142.

(*a*) *Harrison* v. *Williams*, (1824) 3 B. & C. 162; 2 L. J. (O.S.) K. B. 221.

(*b*) *Newell* v. *Simpkin*, (1830) 6 Bing. 565; 8 L. J. (O.S.) C. P. 228; 31 R. R. 499.

(*c*) *May* v. *Gwynne*, (1821) 4 B. & Ald. 301; 23 R. R. 273. In *R.* v. *Harrison*, (1846) 2 Sess. Cas. 490; 9 Q. B. 794, the court refused to grant a mandamus for a ratepayer of a township to inspect the appointment of overseers of the poor for that township.

(*d*) *May* v. *Gwynne*, *supra.*

(*e*) *R.* v. *Smallpiece*, 2 Chit. 288.

poor-rates, and the defendants having averred in justification that the house was within the parish, the plaintiff took issue on this fact, the court held that, at common law, he could not demand an inspection of the parish books, though the defendants alleged that he was a parishioner, for he himself denied the allegation (*f*). However, in that case, a bill of discovery having been filed, the Court of Chancery ordered the defendants to produce the rate-books and other parish documents, which related to the matter in question (*g*). Again, where the inhabitants of a parish had indicted those of a county for non-repair of a bridge, and the question was, which of the litigants were liable to repair it, the court refused to compel the prosecutors to allow the defendants to inspect the parish documents which related to the repair of the bridge (*h*).

§ 1498. The books kept by commissioners of sewers may be mentioned in the same category with parish books; that is, strangers are not entitled to inspect them; and even parties assessed to the sewers-rate have no general right of inspection, but can only claim access to such entries and proceedings as have reference to the rate to which they are themselves assessed, and to the level where their property is situated (*i*). So, where a person was prosecuted for practising physic, not being a member of the College of Physicians, nor having a licence, nor being a graduate of either University, the court refused to grant him a rule to inspect the books of the college on the ground that he was not a member of that body (*k*). It has been held, however, that a *bishop's register of presentations and institutions* is kept for the use of all persons claiming title to livings in his diocese; and accordingly, where the bishop himself and a private person were adverse claimants of the patronage of a particular benefice, the court granted a mandamus to compel the bishop to allow his opponent to inspect so much of the register as related to the benefice in question (*l*). So, a prebendary may, at all reasonable times, inspect such of the charters, statutes, injunctions, and acts of the Chapter, as may be necessary to establish or illustrate his rights concerning his prebend (*m*).

§ 1499. On a similar principle, *fundholders* have been held entitled to inspect and take copies of such entries in the deposit and transfer

(*f*) *Burrell* v. *Nicholson*, (1832) 3 B. & Ad. 649.
(*g*) *Burrell* v. *Nicholson*, (1832) 1 Myl. & K. 680; 36 R. R. 413.
(*h*) *R.* v. *Buckingham JJ.*, (1828) 8 B. & C. 375; 6 L. J. (O.S.) K. B. 346.
(*i*) *R.* v *Commissioner of Sewers for Tower Hamlets*, (1842) 3 Q. B. 670; 11 L. J. Q. B. 231; 61 R. R. 349.
(*k*) *R.* v. *Dr. West*, cited 2 Wils. 240.
(*l*) *R.* v. *Bishop of Ely*, (1828) 8 B. & C. 112; 6 L. J. (O.S.) K. B. 223; 32 R. R. 350.
(*m*) *Young* v. *Lynch*, (1747) 1 W. Bl. 27.

books of the Bank of England (*n*), or of the East India Company, as relate to stock in which they claim to be interested (*o*); and merchants can demand access to such of the Custom House books as contain entries with regard to their goods (*p*). The same doctrine renders a limited inspection of any other books and documents a matter of right, when they constitute the common evidence of transactions between public offices and private individuals, and where the inspection is necessary to establish some disputed claim (*q*). On the other hand, access to these books will not be granted in favour of persons, who have either no interest in them, or who seek to inspect them for some private object unconnected with the purposes for which the books are kept. For instance, where a party brought a *qui tam* action against a postmaster for interfering in the election of a member of Parliament, the court refused the plaintiff a rule to inspect the books of the post-office, because the suit did not relate to any transaction in that office, and the applicant had no interest in its books (*r*).

§ 1500. In accordance with the invariable rule which protects a witness or party from being compelled to furnish evidence that may expose him to a criminal charge (*s*), the court will never oblige a person to allow the inspection (*t*) of either public or private documents in his custody, where the inspection is sought for the purpose of supporting a prosecution against himself (*u*). An information in the nature of a *quo warranto* is not considered as a criminal proceeding within the meaning of this rule (*v*); nor is a mandamus, at least if the object be to enforce a civil right (*x*); but where the lord of a manor was indicted for not repairing the bank of a river *ratione*

(*n*) *Foster* v. *Bank of England*, (1846) 8 Q. B. 689; 15 L. J. Q. B. 212; 70 R. R. 585.

(*o*) *Geery* v. *Hopkins*, (1702) 2 Ld. Raym. 851. As to the right of inspecting documents under the Colonial Stock Act, 1877, see 40 & 41 V. c. 59, ss. 1, 18.

(*p*) *Crew* v. *Saunders*, (1735) 2 Str. 1005.

(*q*) See note by Nolan to *R.* v. *Hostmen of Newcastle*, (1745) 2 Str. 1223, where all the older authorities on the subject are collected and classified. See, also, *R.* v. *King*, (1788) 2 T. R. 235, as to the assessments of the land tax.

(*r*) *Crew* v. *Saunders*, (1735) 2 Str. 1005. See *Atherfold* v. *Beard*, (1788) 2 T. R. 610; 1 R. R. 556; *Benson* v. *Post*, (1748) 1 Wils. 240. See, also, *ante*, § 1497.

(*s*) *Ante*, § 1453.

(*t*) The Order respecting discovery and inspection in the Rules of the Sup. Ct. (Ord. XXXI.) does not affect either criminal proceedings or proceedings on the Crown or Revenue sides of the K. B. D. See Ord. LXVIII.

(*u*) Wigr. Disc. §§ 130—132, 268—270, 285, *et seq.*; *Lord Montague* v. *Dudman*, (1751) 2 Ves. Sen. 397; *Glyn* v. *Houston*, (1836) 1 Keen, 329; *R.* v. *Purnell*, (1749) 1 W. Bl. 37; 1 Wils. 239, S. C.; *R.* v. *Heydon*, (1762) 1 W. Bl. 351; *R.* v. *Buckingham JJ.*, (1828) 8 B. & C. 375; 6 L. J. (O.S.) K. B. 346; *R.* v. *Cornelius*, (1744) 2 Str. 1210. See *Bradshaw* v. *Murphy*, (1836) 7 C. & P. 712.

(*v*) *R.* v. *Shelley*, (1789) 3 T. R. 141; 1 R. R. 673; *R.* v. *Babb*, (1790) *id.* 582; *R.* v. *Purnell*, (1749) 1 W. Bl. 45.

(*x*) *R.* v. *Ambergate Ry.*, (1852) 17 Q. B. 957; 85 R. R. 744.

tenuræ, it was in vain urged in support of a rule to inspect the court rolls, that the indictment, though in form a criminal proceeding, was really to try the right of repair, which was a civil right (*y*).

§ 1501. Where writs, or other proceedings in a cause, are officially in the custody of an officer of the court, it may be doubtful whether he can be compelled to permit them to be inspected for the purpose of furnishing evidence in a civil action against himself. For instance, if an action be brought against the Governor of Holloway Prison for the escape of a debtor, has the plaintiff a right to inspect the writ by which the debtor was committed to the defendant's custody? On this point the old Courts of Queen's Bench and Common Pleas came, a few years ago, to opposite conclusions (*z*).

§ 1502. In all cases where the interference of a court is required in order to obtain the inspection of a document, it must appear by affidavit that an express *demand* to inspect has been made to the proper quarter, and has been distinctly *refused* (*a*). It seems also that this demand must come either directly from the applicant or indirectly from his agent, and that it will not suffice if it be made by a person whom the agent has employed for that purpose (*b*). In stating that there must be a distinct refusal, it is not meant that the word "refuse" or any equivalent expression should be employed, but it will be enough if the party applied to shows clearly by his conduct that he is determined not to do what is required (*c*). Still, nothing short of this will suffice (*d*). If, on the application of a party the liberty to inspect books be offered as a favour, though not as a right, and be consequently declined by the applicant, it may be questionable whether the court will interfere (*e*). Where a party applied to a judge on summons for leave to inspect certain books, but the judge, after hearing both parties, referred the question to the court, it seems to have been considered that the proceedings at chambers were equivalent to a demand and refusal (*f*).

(*y*) *R.* v. *Earl Cadogan*, (1822) 5 B. & Ald. 902; 24 R. R. 612.

(*z*) *Fox* v. *Jones*, (1828) 7 B. & C. 732; 6 L. J. (O.S.) K. B. 131; *Davies* v. *Brown*, (1824) 9 Moore, 778; 3 L. J. (O.S.) C. P. 53. See, also, *R.* v. *Sheriff of Chester*, (1819) 1 Chit. 477.

(*a*) *R.* v. *Wilts. and Berks. Canal Co.*, (1835) 3 A. & E. 477; 42 R. R. 445; *R.* v. *Bristol and Exeter Ry.*, (1843) 4 Q. B. 162; 12 L. J. Q. B. 106. See, also, *R.* v. *Thompson*, (1845) 6 Q. B. 721; *R.* v. *Bodmin JJ.*, [1892] 2 Q. B. 21; 61 L. J. M. C. 151. But the objection that the affidavits disclose no sufficient demand and refusal must be taken before the merits are discussed, 4 Q. B. 171, per Lord Denman, recognising *R.* v. *East. Coast Ry.*, (1839) 10 A. & E. 531, 545, *n*, *b*.

(*b*) *Ex parte Hutt*, (1839) 7 Dowl. 690.

(*c*) *R.* v. *Brecknock and Abergavenny Canal Co.*, (1835) 3 A. & E. 222, 223.

(*d*) *R.* v. *Wilts. and Berks. Canal Co.*, *supra*.

(*e*) *R.* v. *Northleach and Witney Roads Trustees*, (1834) 5 B. & Ad. 978, 982.

(*f*) *Birmingham, Bristol and Thames Junction Ry.* v. *White*, (1841) 1 Q. B. 282, 286.

§ 1503. The preceding observations have been confined to those cases where the right of inspection depends upon the common law; but it now becomes necessary to advert to some *statutes*, which especially provide for the keeping of particular public documents, and for their inspection by parties interested. Thus the Act of 6 & 7 W. 4, c. 86,—as amended by the Births and Deaths Registration Act, 1874 (*g*),—entitles any person to search the register-books of *births, baptisms, marriages, deaths and burials*, and the indexes thereto, and to demand certified copies of any entry in the books, on payment of a small fee (*h*); the Act of 16 & 17 V. c. 134 (*i*), and the Registration of Burials Act, 1864 (*j*), contain similar provisions with respect to searches to be made in, and copies and extracts to be taken from, the registers of burials respectively kept under the directions of the Burial Act, 1852 (*k*), and of those Acts; the Marriage Act, 1836, enacts, that the "marriage notice book," which the superintendent-registrar is bound to keep, shall be "open at all reasonable times without fee to all persons desirous of inspecting the same" (*l*); while,

(*g*) 37 & 38 V. c. 88.

(*h*) 6 & 7 W. 4, c. 86, s. 35, enacts, that "every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register-book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of any register-book in his keeping." [This will include register-books of *baptisms and burials*, which the rector, vicar, or curate of each parish is bound to keep, under the provisions of 52 G. 3, c. 146, s. 5.] "And shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee hereinafter mentioned; (that is to say) for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate." Section 36 is now repealed by 37 & 38 V. c. 88, s. 54, and in lieu thereof it is enacted, by section 32 of the same Act, that the registrar-general shall supply to the superintendent registrars suitable forms and indexes with respect to births and deaths, and that "every person shall be entitled at all reasonable hours to search the said indexes, and to have a certified copy of any entry or entries in the said register-books under the hand of the superintendent registrar, on payment in each case of the appointed fee":—that is, as explained in the 2nd Sched., for a general search, five shillings; for a particular search, one shilling; for a certified copy, two shillings and sixpence.

6 & 7 W. 4, c. 86, s. 37, enacts, that "the registrar-general shall cause indexes of all the said certified copies of the registers to be made, and kept in the general register office; and that every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except Sundays, Christmas-day, and Good Friday, and to have a certified copy of any entry in the said certified copies of the registers; and for every general search of the said indexes shall be paid the sum of twenty shillings, and for every particular search the sum of one shilling; and for every such certified copy the sum of two shillings and sixpence, and no more, shall be paid to the registrar-general, or such other officer as shall be appointed for that purpose on his account." The Act for registering marriages, and also the Act for registering births and deaths, in Ireland, respectively contain similar provisions. See 7 & 8 V. c. 81, ss. 68—70, and 26 & 27 V. c. 11, ss. 50—52. See, also, 52 G. 3, c. 146, s. 5.

(*i*) S. 8.

(*j*) 27 & 28 V. c. 97, s. 6.

(*k*) 15 & 16 V. c. 85.

(*l*) 6 & 7 W. 4, c. 85, s. 5; 7 & 8 V. c. 81, ss. 2, 14; 26 & 27 V. c. 27, ss. 2, 3.

under the Acts of 3 & 4 V. c. 92, and 21 & 22 V. c. 25, which respectively provide for the deposit of certain *non-parochial registers* (*m*) in the custody of the registrar-general, every person is entitled, on payment of certain fees, but *upon personal application only* (*n*), to inspect these registers and the lists of the same (*o*), and to have certified extracts of such entries as he may require (*p*). A similar law prevails with respect to the register of marriages in the Ionian Islands, which is now deposited with the Registrar-General (*q*).

(*m*) These registers consist of more than seven thousand books, belonging to one or other of the following religious communities :—The foreign Protestant Churches in England; the Quakers; the Presbyterians; the Independents; the Baptists; the Wesleyan Methodists, in their several branches; the Moravians; the Countess of Huntingdon's Connection; the Calvinistic Methodists and the Swedenborgians. Besides these, a few registers have been deposited, which belong either to Roman Catholic, Irvingite, Inghamite, Bible Christian, New Jerusalemite, Unitarian, or Scotch Church congregations. The registers transmitted from the foreign Protestant Churches contain entries of births, baptisms, marriages, deaths, and burials; and those sent by the Quakers are registers of births, marriages, and deaths. The remaining books are for the most part registers of births or baptisms, but there are some registers of deaths or burials, and one or two registers of marriages. The dates of these books range from the middle of the 16th century to the year 1840. Most of the registers were sent to the registrar-general from the minister of the congregation to which they belonged, but a valuable collection of these documents was transmitted from Dr. Williams' library, in Redcross-street, and another smaller one from the Wesleyan Registry in Paternoster-row. It may be observed, that the Jews have declined to part with their registers, as have also the Roman Catholic prelates in most instances. The registers, too, of births and deaths, which are kept at the Heralds' College from the year 1747 to 1783; the records of Indian baptisms, deaths, and marriages, deposited at the office of the Secretary for India; and the registers of births, baptisms, marriages, and burials of British subjects abroad, transmitted to the registry of the Consistory Court of London, are excluded from the operation of the Act. See Report of Commiss. appointed to inquire into the state, &c., of non-parochial registers, which was presented to Parliament in 1838; and another report of the Commiss. bearing date 31 Dec., 1857.

(*n*) See fly-sheet to "Lists of Non-Parochial Registers," published by the registrar-general, pursuant to the Act of 1841.

(*o*) A list of the non-parochial registers in the custody of the registrar-general was published in 1841, and contains a statement—1, of the number marked on each register—2, of the name of the place of worship—3, of the denomination and date of the foundation—4, of the name of the last minister—5, of the number of the books deposited, and the nature of the entries—and, 6, of the period over which each register extends. Copies of this list have been sent to every person, congregation, or society, having had the custody of any of the deposited registers, as also to every superintendent-registrar, and to the registrar-general, to be open for inspection at the respective offices, without fee. A list of the registers deposited under 21 & 22 V. c. 25, is given in App. A to the Report of the Commiss. dated 31 Dec., 1857.

(*p*) 3 & 4 V. c. 92, s. 5, enacts, that "the registrar-general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this Act; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day, and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of her Majesty's principal Secretaries of State, and to have a certified extract of any entry in the said registers or records; and for every search in any such register or record shall be paid the sum of one shilling; and for every such certified extract the sum of two shillings and sixpence, and no more."

(*q*) 27 & 28 V. c. 77, s. 9.

§ 1504. Again, the Municipal Corporation Act, 1882 (*r*), contains, in section 233, the following special provisions relating to the inspection and copying of documents. "(1). The minutes of proceedings of the council shall be open to the inspection of a burgess on payment of a fee of one shilling, and a burgess may make a copy thereof or take an extract therefrom.

"(2). A burgess may make a copy of, or take an extract from, an order of the council for the payment of money.

"(3). The treasurer's accounts shall be open to the inspection of the council, and a member of the council may make a copy thereof or take an extract therefrom.

"(4). The abstract of the treasurer's accounts shall be open to the inspection of all the ratepayers of the borough, and copies thereof shall be delivered to a ratepayer on payment of a reasonable price for each copy.

"(5). The Freemen's Roll shall be open to public inspection, and the town clerk shall deliver copies thereof to any person on payment of a reasonable price for each copy.

"(6). A document directed by this Act to be open to inspection shall be so open at any reasonable time during the ordinary hours of business, and without payment, unless it be otherwise expressed.

"(7). If a person having the custody of any documents in this section mentioned,—(a) obstructs any person authorised to inspect the same in making such inspection thereof as in this section mentioned; or (b) refuses to give copies or extracts to any person entitled to obtain the same under this section;—he shall, on summary conviction, be liable to a fine not exceeding five pounds."

§ 1505. In certain circumstances, defined in the Parliamentary and Municipal Registration Act, 1878 (*s*), burgesses have a right, free of charge, to inspect and make copies of the books containing the poor rates.

§ 1506. "Any person interested in or assessed to any rate" made under the Public Health Act, 1875, "may inspect the same, and any estimate made previously thereto, and may take copies of or extracts therefrom without fee or reward" (*t*). So, also, all registers of mortgages on rates, kept at the offices of the local authorities under the same Act, "shall be open to public inspection during office hours without fee or reward" (*u*).

§ 1507. Under the Companies (Consolidation) Act, 1908 (*v*), any person may inspect, and require a certified copy or extract of, any

(*r*) 45 & 46 V. c. 50.
(*s*) 41 & 42 V. c. 26, s. 13.
(*t*) 38 & 39 V. c. 55, s. 219.
(*u*) S. 237.
(*v*) 8 Ed. 7, c. 69, s. 243 (6). This sub-section replaces 25 & 26 V. c. 89, s. 174 (5). See *R.* v. *Mariquita & New Gren. Min. Co.*, (1858) 28 L. J Q. B. 67.

document which is kept by the *registrar of joint-stock companies*; and every member of a company duly registered under that Act is entitled, during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, to inspect gratis the register of members which is kept at the registered office of the company (*x*). Even strangers have a similar right on payment of a small fee, and they, as well as members, can obtain a copy of any part of the register, if they are prepared to pay sixpence for every hundred words copied (*y*). So, the Companies Clauses Consolidation Act,—which applies to every joint-stock company incorporated by statute since the 8th of May, 1845, for the purpose of carrying on any undertaking,—contains several provisions authorising parties interested to inspect and demand copies of the books and documents relating to the company's affairs (*z*); and the same observations may be made with respect to the Commissioners Clauses Act, 1847 (*a*), to several other Consolidation Acts passed in 1847 (*b*), to the Railway Companies (Accounts and Returns) Act, 1911 (*c*), and to the Metropolis Water Act, 1871 (*d*). The *Railway Clauses Consolidation Act* (*e*),—which applies to all railways authorised to be constructed since the 8th of May, 1845,—contains also an important provision on this subject, for it enacts, in section 107, that every railway company subject to that Act shall, if required, transmit a copy of its annual account of disbursements and receipts, duly audited, and free of charge, to the overseers of the poor of the several parishes, and to the clerks of the peace of the counties, through which the railway shall pass; and such accounts shall be open to the inspection of the public at all reasonable hours, on payment of one shilling. An easy mode is thus afforded of ascertaining the sum at which the company should be assessed to the parochial and county rates.

§ 1508. On payment of the prescribed fees in the shape of stamps, "any person may inspect, and make copies of, and extracts from,

(*x*) 8 Ed. 7, c. 69, s. 30.

(*y*) *Id.* This provision does not apply to the case of a company in liquidation; *Re Kent Coal Fields Syndicate, Ltd.*, [1898] 1 Q. B. 754; 67 L. J. Q. B. 500; nor does it entitle the person inspecting himself to take extracts from or make copies of the entries in the register: *Re Balaghat Gold Mining Co.* [1901] 2 K. B. 665; 70 L. J. K. B. 866.

(*z*) 8 & 9 V. c. 16, ss. 10, 45, 63, 115, 116, 117, 118, 119. See *R.* v. *London and St. Katherine Dock Co.*, (1874) 44 L. J. Q. B. 4; and *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708; 78 L. J. Ch. 445.

(*a*) 10 & 11 V. c. 16, ss. 31, 55, 76, 88—90.

(*b*) See Markets and Fairs Cl. Act, 10 & 11 V. c. 14, s. 50; Gas-Works Cl. Act, *id.* c. 15, s. 38; Waterworks Cl. Act, *id.* c. 17, s. 83; Harbours, Docks, and Piers Cl. Act, *id.* c. 27, s. 50.

(*c*) 1 & 2 G. 5, c. 34, s. 2.

(*d*) 34 & 35 V. c. 113, ss. 23, 37. By the Metropolis Water Act, 1902 (2 Ed. 7, c. 41) the rights, powers, duties and obligations of the various companies are now transferred to the Metropolitan Water Board.

(*e*) 8 & 9 V. c. 20.

the register of securities, the register of mortgage debentures, and the returns made by the company to the registrar," under the provisions of the Mortgage Debenture Act, 1865 (*f*). So the registers of "Nominal Securities," which are kept under the Local Loans Act, 1875, may be inspected at all reasonable times by any person upon payment of the prescribed fee (*g*).

§ 1509. Under the Friendly Societies Act, 1896, any "member or person having an interest in the funds of a registered society or branch" may "inspect the books at all reasonable hours at the registered office of the society or branch, or at any place where the books are kept"; but one member may not inspect the loan account of another without his written consent (*h*).

§ 1510. Under the Land Transfer Act, 1875, any registered proprietor of any land or charge, and any person authorised by him, or by an order of the court, or by general rule, but no other person, may, subject to the regulations in force, inspect and make copies of, and extracts from, any register or document in the custody of the registrar relating to such land or charge (*i*). Subject also to such regulations as may be made by the Treasury, every person has a right to search any of the indexes kept at the office for the registration of assurances of lands in Ireland (*k*).

§ 1511. Under the Patents and Designs Act, 1907, "every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to the provisions of this Act and to such regulations as may be prescribed (*l*); and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same, on payment of the prescribed fee" (*m*). The Patents Rules, 1908, further provide by Rule 96, that "certified copies of any entry in the register, or certified copies of, or extracts from, patents, specifications, disclaimers, affidavits, statutory declarations, and other public documents in the Patent Office, or of or from registers or other books kept there, may be furnished by the comptroller on payment of the prescribed fee" (*n*).

§ 1512. By the joint operation of the Solicitors Acts, 1843 and 1877 (*o*), every person is entitled, without fee, to have free access to

(*f*) 28 & 29 V. c. 78; 33 & 34 V. c. 20, s. 11.
(*g*) 38 & 39 V. c. 83, s. 24
(*h*) 59 & 60 V. c. 25, s. 40.
(*i*) 38 & 39 V. c. 87, s. 104.
(*k*) 13 & 14 V. c. 72, s. 52.
(*l*) See Patents Rules, 1908, R. 94.
(*m*) 7 Ed. 7, c. 29, s. 67. But see section 56, which limits the right of inspecting registered designs. See as to the fee, Patents Rules, Sch. I.
(*n*) See as to the fee, Sch. I.
(*o*) 6 & 7 V. c. 73, s. 23; 40 & 41 V. c. 25. See, also, 61 & 62 V. c. 17, s. 33.

the rolls of solicitors, which are now kept by the officer appointed for that purpose under the last-named Act;—to the books containing an abstract of the affidavits sworn by such solicitors as have articled clerks, which books are placed under the same custody as the rolls;—and to the books kept by the registrar, in which are entered the particulars of the declarations signed by solicitors preparatory to obtaining their certificates.

§ 1513 Under the High Peak Mining Customs and Mineral Courts Act, 1851, all persons are at liberty, at convenient times in the day-time, to search and examine all documents in the custody of the Steward of the Barmote Courts by virtue of that Act, upon payment of the fees therein specified (*p*).

§ 1514. By the Act of 7 W. 4 & 1 V., c. 83, s. 1, clerks of the peace, town-clerks, and other persons holding official situations are required to take custody of all maps, plans, sections, books, and writings, which, by the standing orders of either House of Parliament, are directed to be deposited with them, previous to the introduction of any railway bill, or other bill of a like nature; and the same statute enacts, in section 2, that all persons interested shall have liberty to inspect, and take copies of, or extracts from, these documents, on payment of certain regulated fees. The provisions of this Act have been extended by several consolidation and other Acts to the maps, plans, and sections of other undertakings, and to the maps, plans, and sections of alterations proposed to be made therein (*q*); as also to copies of the special Acts, by which particular companies, commissioners, or other undertakers have been authorised to act (*r*).

§ 1515. Under the Juries Act, 1825, the churchwardens and overseers of every parish are directed to make out a list of every person qualified to serve on juries, and to allow such list to be perused gratis by any inhabitant, at all reasonable times during the first three weeks of September (*s*); while the Common Law Procedure Act, 1852, enacts, that a printed panel of the jurors summoned,

(*p*) 14 & 15 V. c. 94, s. 45.

(*q*) See Rail. Cl. Consol. Act, 8 & 9 V. c. 20, s. 9; do. for Scotland, *id.* c. 33, s. 9; Waterworks Cl. Act, 10 & 11 V. c. 17, s. 21.

(*r*) Comp. Cl. Consol. Act, 8 & 9 V. c. 16, s. 161; do. for Scotland, *id.* c. 17, s. 165; Lands Cl. Consol. Act, *id.* c. 18, s. 150; do. for Scotland, *id.* c. 19, s. 142; Railway Cl. Consol. Act, *id.* c. 20, s. 162; do. for Scotland, *id.* c. 33, s. 153; Markets and Fairs Cl. Act, 10 & 11 V., c. 14, s. 58; Gas-works Cl. Act, *id.* c. 15, s. 45; Comm. Cl. Act, *id.* c. 16, s. 110; Waterworks Cl. Act, *id.* c. 17, s. 90; Harbours, Docks, and Piers Cl. Act, *id.* c. 27, s. 97; Towns Improvement Cl. Act, *id.* c. 34, s. 214; Cemeteries Cl. Act, c. 65, s. 66; and Town Police Cl. Act, *id.* c. 89, s. 77. See, also, 9 & 10 V. c. 3, s. 13, as to plans, &c., of harbours, and other works in Ireland, constructed by Comm. to encourage sea fisheries.

(*s*) 6 G. 4, c. 50, s. 9.

whether common or special, shall, seven days at least before the sitting of every court, be kept at the sheriff's office for public inspection, and that a printed copy of such panel shall be delivered by the sheriff to any party requiring it, on payment of one shilling (*t*)

§ 1516. Under the Act of 1843 for *registering persons entitled to vote for members of Parliament*, every person was at liberty, during the fortnight next after publication, to inspect gratis the lists of claimants, the registers of voters, and the lists of persons objected to, which were made out by the overseers and town clerks respectively, as also to obtain written or printed copies of these documents, on payment of a small sum (*u*). Under the Representation of the People Act, 1918 (7 & 8 G. 5, c. 64) it is the duty of the registration officer to publish the spring register not later than the 15th day of April, and the autumn register not later than the 15th day of October in each year and to keep copies of the register for inspection (*v*), and also on payment of the prescribed fee to furnish copies of the register or of so much of it as relates to any registration unit (*x*). So, also, under the Act of 41 & 42 V. c. 26, a more extensive right to inspect and make copies of poor-rates is afforded to every person "who is registered as a parliamentary voter" (*y*). Again, under the Ballot Act, 1872, all documents forwarded by the returning officer to the Clerk of the Crown in Chancery, other than ballot papers and counterfoils, are open to public inspection at such time and under such regulations as the clerk, with the consent of the Speaker, may prescribe; and the Clerk will also supply copies or extracts to any person on the payment of such fees as the Treasury may sanction (*z*).

§ 1517. Under the Poor Law Amendment Act, 1834, every owner of property, or his agent, and every ratepayer, is entitled to inspect gratis the rules sent by the late Poor-law Board, or the present Local Government Board, to the overseers of his parish, or to the guardians of his union, as also to take copies of such rules, or to require copies to be furnished to him, on payment of a trifling charge (*a*). For seven days, too, before the auditing of the overseers' accounts, their rate-books are open, between the hours of eleven

(*t*) 15 & 16 V. c. 76, ss. 106—108. As to the practice in Ireland, see 34 & 35 V. c. 65, ss. 12, 18.

(*u*) 6 & 7 V. c. 18, ss. 5, 8, 13, 14, 18, 20. As to the law in Ireland, see 13 & 14 V. c. 69.

(*v*) 7 & 8 G. 5, c. 64, rule 27.

(*x*) Id., rule 28.

(*y*) S. 13.

(*z*) 35 & 36 V. c. 33, 1st Sch. 1st Part, r. 42.

(*a*) 4 & 5 W. 4, c. 76, s. 18. See 10 & 11 V. c. 109, ss. 10, 29; 34 & 35 V. c. 70.

and three, for the inspection of every person liable to be rated to the relief of the poor (*b*).

§ 1518. Under the Valuation Metropolis Act, 1869, any documents required by that Act to be deposited with the rate-books of the parish, and especially all valuation lists, may be inspected and copied without charge by any ratepayer (*c*).

§ 1519. Under the Highway Act, 1835, the surveyors are directed to keep books of account, and these books are open at all seasonable times to the inspection of all inhabitants rated to the highway rate of the parish or district, who are also entitled to take copies or extracts from them without fee (*d*).

§ 1520. The annual accounts of the *Trustees of Charities*, which are now, by virtue of the Charitable Trusts Acts of 1853 and 1855, either deposited at the office of the Charity Commissioners, or inserted in the books of the local vestries, are open to the inspection of all persons at all seasonable hours, subject to the regulations of the Commissioners; and, moreover, any person may, on payment of a trifling sum, require a copy of any such account, or of any part thereof (*e*). So, the books of accounts, which the commissioners of public baths are directed to keep, may be examined and copied gratis by any commissioner, churchwarden, overseer, or ratepayer, of the parish in which the baths are established (*f*). Similar clauses are inserted in the Act 18 & 19 V. c. 120 (*g*).

§ 1522. Under the Newspaper Libel and Registration Act, 1881, all persons are at liberty to search and inspect the book called "The Register of Newspaper Proprietors," which is kept by the Registrar of Joint-stock Companies, and to demand certified copies of any such entry (*h*). Again, every person may, upon payment of a reasonable fee, inspect the register book kept by any registrar of British ships under the Merchant Shipping Act, 1894, as also any of the documents recorded by the registrar-general of shipping and seamen (*i*). In addition to this long string of statutes, many other

(*b*) 7 & 8 V. c. 101, s. 33. See, also, 17 G. 2, c. 3, s. 3; 6 & 7 W. 4, c. 96, s. 5; *Tennant* v. *Creston*, (1846) 2 Sess. Cas. 425; 15 L. J. M. C. 105; 70 R. R. 592; and *Tennant* v. *Bell*, (1846) 9 Q. B. 684; 16 L. J. M. C. 31.

(*c*) 32 & 33 V. c. 67, ss. 67—69.

(*d*) 5 & 6 W. 4, c 50, s. 40.

(*e*) 18 & 19 V. c. 124, s. 44, amending s. 61 of 16 & 17 V. c. 137.

(*f*) 9 & 10 V. c. 74, s. 14; *id.* c. 87, s. 5.

(*g*) Ss. 61, 198, 199; amended by 62 & 63 V. c. 14.

(*h*) 44 & 45 V. c. 60, s. 13.

(*i*) 57 & 58 V. c. 60, ss. 64, 256.

public Acts, and a vast number of local and personal Acts, contain provisions enabling interested persons to inspect and obtain copies of particular documents (*k*).

§ 1522A. When the public are entitled by law to inspect any register kept in pursuance of any Act of Parliament, the publication of a mere copy of it is privileged (*l*).

§ 1523. THE MODE OF PROVING PUBLIC DOCUMENTS must now in the SECOND PLACE, be considered. And, first, as to *legislative Acts*. It has already been seen that *public statutes* need no proof, being supposed to exist in the memories of all (*m*). Still, for certainty of recollection, reference is had to a printed copy, and if the accuracy of such copy be questionable, the court will consult the Parliament roll (*n*). In most of the *local and personal Acts* it was customary, prior to the year 1851, to insert a clause, declaring that the Act should be deemed public, and should be judicially noticed: and the effect of this clause was to dispense with the necessity, not only of pleading the Act specially, but of producing an examined copy, or a copy printed by the printer for the Crown (*o*). Since the commencement of the year 1851 this clause, however, has been omitted, the Legislature having enacted that every Act made after that date shall be deemed a public Act, and be judicially noticed as such, unless the contrary be expressly declared (*p*). The simplest mode of proving those few Acts, whether they be local and personal, or merely private, which, being passed before the year 1851, contain no clause declaring them to be public, or which, being passed since that date, contain an express clause, declaring them not to be public, is by producing a copy, which, if it purports to be printed by the King's printer, or under the superintendence or authority of His Majesty's Stationery Office (*q*), need not be proved to be so (*r*); or the Act may be proved by means of an examined copy, shown on oath to have been compared with the Parliament roll (*s*). Where the

(*k*) See, as to Banker's books, 42 & 43 V. c. 11, s. 7, cited *post*, § 1608A. Reference may also be made to the Limited Partnerships Act (7 Ed. 7, c. 24), s. 16, and the Registration of Business Names Act (6 & 7 G. 5, c. 58), s. 16.

(*l*) *Searles* v. *Scarlett*, [1892] 2 Q. B. 56; 61 L. J. Q. B. 573; *Fleming* v. *Newton*, (1848) 1 H. L. C. 363; 73 R. R. 88.

(*m*) *Ante*, § 5.

(*n*) *R.* v. *Jeffries*, (1721) 1 Str. 446.

(*o*) *Woodward* v. *Cotton*, (1834) 1 Cr. M. & R. 44, 47; 3 L. J. Ex. 300; 40 R. R. 489; *Beaumont* v. *Mountain*, (1834) 10 Bing. 404; 3 L. J. C. P. 118; 38 R. R. 484. These cases explain, and partially overrule, *Brett* v. *Beales*, (1829) Moo & M. 421; 8 L. J. (O.S.) K. B. 141; 34 R. R. 499.

(*p*) 13 & 14 V. c. 21, s. 7; now repealed and replaced by 52 & 53 V. c. 63, s. 9.

(*q*) 45 V. c. 9, s. 2.

(*r*) 8 & 9 V. c. 113, s. 3, cited *ante*, § 7.

(*s*) B. N. P. 225.

Acts have not been printed by any such authorised printer, as is sometimes the case with respect to Acts for naturalizing aliens, for dissolving marriages, for inclosing lands, and for other purposes of a strictly personal character, an examined copy, or a certified transcript into Chancery, if there be one (*t*), furnishes the regular proof.

§ 1524. Before leaving the subject of legislative acts, it may be observed that the *statutes passed in Ireland prior to the Union* are conclusively proved in any court of Great Britain by producing a copy of them printed and published by the printer for the Crown; and, in like manner, the copies of the statutes of England and of Great Britain, which have been printed and published by the Government printer, are receivable as conclusive evidence in any court in Ireland (*u*)

§ 1525. It has been already remarked, that the *statute* or *written law* of any *foreign nation* cannot be proved in English courts of justice by the production of a copy of the law, however well authenticated; but that, in all cases, it is necessary to call some person, skilled in the foreign law, to prove the existence and meaning of the statute or code on which reliance is placed (*v*).

§ 1526. *Acts of State* may be proved in various ways, according to the nature of the document. *British treaties* may be proved, by producing either the originals, or copies exemplified under the Great Seal, or examined copies, or copies coming from the Government press; but, in this last case, it may be doubtful whether the Courts would be satisfied, without proof that the copy was actually printed by the printer for the Crown. *Charters*, *letters-patent* (*x*), *letters-close*, *grants from the Crown*, *pardons*, and *commissions*, will be most conveniently proved by the production of the originals under the Great Seal (*y*), the Privy Seal (*z*), or the Royal Sign-manual; but as these are matters of public record (*a*), they might also, as it seems, be proved by exemplifications under the Great Seal, or by examined copies. It may be further stated with respect to letters-

(*t*) Roos Barony, (1804), Min. Ev. 145, cited Hubb. Ev. of Suc. 613.

(*u*) 41 G. 3, c. 90, s. 9. It is presumed that this section would be satisfied by producing a copy which *purported* to be printed by the Government printer, without proof that it was actually so printed. The words, however, in their strict sense, do not admit of this construction, and the evil is not remedied by the Docum. Evid. Act, 8 & 9 V. c. 113, cited *ante*, § 7. See *Woodward* v. *Cotton*, *supra*. See also 45 & 46 V. c. 9, and qu. as to the effect, if any, produced by that Act.

(*v*) *Ante*, §§ 1423—1425.

(*x*) As to proof of patents for inventions, see *post*, § 1603.

(*y*) See the Great Seal Act, 1884, 47 & 48 V. c. 30; also, 40 & 41 V. c. 41.

(*z*) Since 28th July, 1884, no instrument is required to be passed under the Privy Seal; 47 & 48 V. c. 30, s. 3.

(*a*) 2 Bl. Com. 346.

patent under the Great Seal, that these, being records, are valid before enrolment, and that, whether tendered in evidence in England or in Ireland, they are admissible without any proof of an inquisition, or of a warrant or letter from the Crown directing the grant (*b*).

§ 1527. *Royal Proclamations*, and *Orders and Regulations issued under the authority of Government*, may be proved, like other public documents, by producing either the originals, or examined copies; and in addition to these obvious modes of proof, others have been afforded and defined by the Documentary Evidence Act, 1868 (*c*), as amended by the Documentary Evidence Act, 1882 (*d*). Section 2 of the first-named statute, when read in connection with section 4 of the last-named, enacts, that "Primâ facie evidence of any proclamation, order or regulation (*e*) issued before or after the passing of this Act by his Majesty, or by the Privy Council, or by the Lord Lieutenant or other chief governor or governors of Ireland, either alone or acting with the advice of the Privy Council in Ireland, also of any proclamation, order (*f*) or regulation, issued before or after the passing of this Act by or under the authority of any such department of the government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:—

"(1.) By the production of a copy of the Gazette (*g*) purporting to contain such proclamation, order, or regulation:

"(2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer (*h*), or by any printer to his Majesty in Ireland, or by any printer printing either in England or Ireland under the superintendence or authority of his Majesty's Stationery Office (*i*)—or, where the question arises in a court in any

(*b*) *Duke of Devonshire* v. *Neill*, (1877) 2 L. R. Ir., 132.

(*c*) 31 & 32 V. c. 37.

(*d*) 45 & 46 V. c. 9.

(*e*) This Act is made specially applicable to "any rule made by a Secretary of State" in pursuance of the Prison Act, 1877, 40 & 41 V. c. 21, s. 51. A by-law under the Military Lands Act, 1892 (55 & 56 V. c. 43) is deemed to be a "regulation" under the Documentary Evidence Act: see section 17 (3) of 55 & 56 V. c. 43. "Regulation" also includes any document issued by the Board of Agriculture; 58 V. c. 9: also any document issued by any of the bodies of Insurance Commissioners, or the Joint Committee; 3 & 4 G. 5, c. 29 (3); also any document issued by the Minister of Munitions: 5 & 6 G. 5, c. 54, s. 18. As to the proof of the Irish prison rules, see *post*, § 1663.

(*f*) See the Post Office Act, 1908 (8 Ed. 7, c. 48), s. 36.

(*g*) This includes the London, the Dublin and the Edinburgh Gazettes: 31 & 32 V. c. 37, s. 5. See, also, 40 & 41 V. c. 41, s. 3, sub-s. 3. The entire Gazette must be produced: a cutting from it will not suffice; *R.* v. *Lowe*, (1883) 15 Cox, 286; 52 L. J. M. C. 122, S. C.

(*h*) *Huggins* v. *Ward*, (1873) L. R. 8 Q. B. 521.

(*i*) 45 & 46 V. c. 9, ss. 2, 4.

British colony or possession, of a copy purporting to be printed under the authority of the Legislature of such British colony or possession:

"(3.) By the production, in the case of any proclamation, order, or regulation issued by his Majesty, or by the Privy Council in England, or by the Lord Lieutenant or his Privy Council in Ireland (*k*), of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."

Sections 3 and 4,—relating, as they do, to matters of minor importance,—will be found in the note below (*l*). Section 5 enacts, that "the following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; (that is to say)

"'British colony and possession' shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in his Majesty, by virtue of any Act of Parliament for the government of India and all other his Majesty's dominions:

"'Legislature' shall signify any authority, other than the Imperial Parliament or his Majesty in Council, competent to make laws for any colony or possession:

"'Privy Council' shall include his Majesty in Council, and the

(*k*) 45 & 46 V. c. 9, s. 4.

(*l*) Section 3 enacts, that, "subject to any law that may be from time to time made by the Legislature of any British colony or possession, this Act shall be in force in every such colony and possession."

Section 4 enacts, that "if any person commits any of the offences following, that is to say,

(1.) Prints any copy of any proclamation, order, or regulation, which falsely purports to have been printed by the government printer, or to be printed under the authority of the Legislature of any *British* colony or possession, or tenders in evidence any copy of any proclamation, order, or regulation, which falsely purports to have been printed as aforesaid, knowing that the same was not so printed;

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude.

Lords and others of his Majesty's Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto; also the Privy Council in Ireland or any committee thereof (*m*).

"'Government printer' shall mean and include the printer to his Majesty, whether in England or Ireland, and any printer printing either in England or Ireland under the superintendence or authority of His Majesty's Stationery Office (*n*), and any printer purporting to be the printer authorised to print the statutes, ordinances, acts of state, or other public acts of the Legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession:

"'Gazette' shall include 'The London Gazette,' 'The Edinburgh Gazette,' and 'The Dublin Gazette,' or any of such Gazettes."

Section 6 enacts, that "the provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law" (*o*).

SCHEDULE AS AMENDED BY SUBSEQUENT LEGISLATION (*p*).

COLUMN I. Name of Department or Officer.	COLUMN II. Names of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee.
The Poor-law Board (*q*).	Any Commissioner of the Poor-law Board, or any Secretary or Assistant Secretary of the said Board.

(*m*) 45 & 46 V. c. 9, s. 4.

(*n*) 45 & 46 V. c. 9, ss. 2 & 4.

(*o*) A document purporting to be an order made by an inspector of the Local Government Board for Ireland under 6 Ed. 7, c. 37, s. 6, and to be signed by him, or purporting to be a copy of such an order and to be certified as such a copy by the Secretary or Assistant-Secretary of the Board, is admissible in evidence in any court: The Labourers (Ireland) Act, 1911 (1 & 2 G. 5, c. 19), s. 7.

(*p*) See, also, the New Ministries and Secretaries Act, 1916 (6 & 7 G. 5, c. 68), s. 11 (4).

(*q*) Abolished by 34 & 35 V. c. 70, s. 2.

SCHEDULE AS AMENDED BY SUBSEQUENT LEGISLATION—*continued.*

COLUMN I. Name of Department or Officer.	COLUMN II. Names of Certifying Officers.
The Local Government Board (*r*).	Any Member of the Local Government Board, or any Secretary or Assistant Secretary of that Board.
The Board of Education (*s*).	Any Member of the Board of Education Department, or any Secretary or Assistant Secretary.
The Postmaster-General (*t*).	Any Secretary or Assistant Secretary of the Post Office.
The Board of Agriculture (*u*).	The President, or any Member of the Board, or the Secretary of the Board, or any person authorised by the President to act on behalf of the Secretary of the Board.
The several bodies of Insurance Commissioners, and the Joint Committee (*v*).	The Chairman, or any other Member, or the Secretary or Clerk, or any person authorised to act on behalf of the Secretary or Clerk, of the body or committee.
The Minister of Munitions (*x*).	The Minister of Munitions, or a Secretary in the Ministry, or any person authorised by the Minister to act on his behalf.
Army Council (*y*).	Two Members of the Army Council, or the Secretary to the Army Council, or any person authorised by the Army Council to act on their behalf.
Secretary for Scotland (*y*).	Secretary for Scotland, or an Under-Secretary or Assistant Under-Secretary for Scotland.
Local Government Board for Ireland (*y*).	Commissioner of the Local Government Board for Ireland, or a Secretary or Assistant Secretary of the said Board.
The Minister of Pensions (*z*).	The Minister, or a Secretary of the Ministry, or a person authorised by the Minister.
The Air Council (*a*).	The President, or a Secretary of the Council, or any person authorised by the President to act on behalf of the Council.

§ 1528. All *proclamations, treaties, and other acts of State*, of any *Foreign State* or of any *British Colony*, may be proved either by examined copies, or by copies *purporting* to bear the seal of the state or colony to which they respectively belong (*b*). In one case,

(*r*) 34 & 35 V. c. 70, s. 5. See, also, 38 & 39 V. c. 55, ss. 130, 135, 297, subs. 7; and 41 and 42 V. c. 52, s. 265. The functions of the Local Government Board are now transferred to the Ministry of Health (9 G. 5, c. 21).

(*s*) 33 & 34 V. c. 75, s. 83; 62 & 63 V. c. 33.

(*t*) 8 Ed. 7, c. 36.

(*u*) 58 V. c. 9.

(*v*) 3 & 4 G. 5, c. 37, s. 29 (3).

(*x*) 5 & 6 G. 5, c. 54, s. 18.

(*y*) 5 & 6 G. 5, c. 94, s. 5.

(*z*) 6 & 7 G. 5, c. 66, s. 6.

(*a*) 7 & 8 G. 5, c. 54, s. 10.

(*b*) 14 & 15 V. c. 99, s. 7, cited *ante*, § 10.

where a book was tendered in evidence which purported to be a collection of treaties concluded by America, and was declared to have been published by authority there, as a regular copy of the archives in Washington; and it was further proposed to prove, by the American Minister resident at this Court, that the book was the rule of his conduct; Lord Ellenborough rejected the evidence, observing that he would not have admitted a book of Spanish treaties, though proved to have been printed by the King's printer in that country (*c*).

§ 1528A. The Evidence (Colonial Statutes) Act, 1907 (*d*) provides that copies of Acts, ordinances, and statutes passed by the Legislature of any British possession, and of orders, regulations, and other instruments issued or made, under the authority of any such Act, ordinance or statute, if purporting to be printed by the Government printer, shall be received in evidence by all courts of justice in the United Kingdom without any proof being given that the copies were so printed.

§ 1529. The Documentary Evidence Act, of 1845,—as already observed,—renders copies of the *Journals* of either House of Parliament admissible in evidence, provided that they purport to be printed by the printers of either House; and it is not necessary to prove that the copies were in fact so printed (*e*).

§ 1530 The *Articles of War* for the government of the navy, the army, and the marines, are respectively embodied or authorised in public statutes (*f*), and, consequently, require no proof (*g*). Moreover, the Army Act, 1881, contains what may perhaps be regarded as a needless enactment, providing, that all "copies purporting to be printed by a government printer," whether of King's regulations, including Admiralty regulations so far as concerns the Royal Marines, or of royal warrants, or of army circulars, or of rules made by his Majesty, or a Secretary of State, or the Army Council (*h*), in pursuance of that Act, shall be evidence of such regulations, royal warrants, army circulars and rules (*i*).

§ 1531. The reports made by the Commissioners or the Surveyor-General of the Woods and Forests, either to the King or to Parlia-

(*c*) *Richardson* v. *Anderson*, (1805) 1 Camp. 65, n. *a.*; 10 R. R. 628, n.
(*d*) 7 Ed. 7, c. 16.
(*e*) 8 & 9 V. c. 113, s. 3, cited *ante*, §§ 7, 8.
(*f*) 29 & 30 V. c. 109; 44 & 45 V. c. 58, ss. 69, 179.
(*g*) *Ante*, § 5.
(*h*) 9 Ed. 7, c. 3.
(*i*) 44 & 45 V. c. 58, s. 163, subs. (*c*), and s. 179, subs. 11. See, also, 8 G. 5, c. 8, s. 12 (1).

ment, may, by virtue of the Crown Lands Act, 1873, be proved by copies purporting to have been printed by the order of either House (*k*). This enactment might well be rendered applicable to all reports which have been presented either to the Crown or to Parliament.

§ 1531A. In Ireland, a deed founding a public trust has been regarded as quasi-public, and an alleged extract from it, which was publicly exhibited and subsequently kept by a governor of the trust and purported to be signed by the founder of the charity, has been admitted in evidence (*l*).

§ 1532. There is a rule which must not be lost sight of in any case where an *original record* of the High Court is required to be produced at the trial. It is in these words:—"No affidavit or record of the court shall be taken out of the Central Office without the order of a judge or master, and no subpœna for the production of any such document shall be issued" (*m*).

§ 1533. The *general records of the realm*, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be certified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed or stamped with the seal of the Record Office (*n*); and in cases of importance before the House of Lords or elsewhere, permission will be given to one of the assistant-keepers to produce the original record.

§ 1534. The next class of public documents to be considered consists of the *records of courts of justice*, and other judicial writings. And, first, as to the *records* of the Supreme Court, and of the old

(*k*) 36 & 37 V. c. 36, s. 6.

(*l*) *In re Hospital for Incurables*, (1884) 13 L. R. *Ir* 361.

(*m*) Ord. LXI., R. 28.

(*n*) 1 & 2 V. c. 94, s. 12, enacts, that "the Master of the Rolls or deputy-keeper of the records may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy by the deputy-keeper of the records, or one of the assistant record-keepers aforesaid, and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." Section 13 enacts, that "every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there as evidence." For the corresponding enactments in the Public Records (Ireland) Acts, 1867 and 1875, see 30 & 31 V. c. 70, ss. 19, 20; 38 & 39 V. c. 59, ss. 9, 10.

superior courts of law and equity, and the *quasi-records* of those courts. The expression "quasi-records" will embrace depositions, affidavits, bills, answers, orders, and decrees, filed in the old Court of Chancery, rules of court, and certain other documents, which, although not strictly records (*p*), partake so much of their nature, that they can be proved by means of copies (*q*) to the same extent as records, and are subject generally to the same rules of evidence. Indeed, henceforth, for the sake of convenience, the general term "records" will alone be used, and will include all the documents just mentioned. Now, the records of the superior courts may either be proved by the mere production of the *originals*, or—as this course would be highly inconvenient to the public if generally adopted, since it might lead to the mutilation or loss of valuable documents,—they may also be proved by the production of a duly certified copy of an entry in the Entry-Book of Judgments of the Court in which judgment was given (*r*), or by means of *copies* (*s*). Of these, there are *four kinds;* viz., exemplifications under the Great Seal; exemplifications under the seal of the particular court where the record remains; office copies; and examined copies (*t*).

§ 1535. One or other of these copies will always be admissible in lieu of the original *record, excepting in two cases* (*u*): first, if issue has been joined on a statement of defence or a reply of *nul tiel record*, in some cause in a court to which the disputed record belongs (*v*); and secondly, if a person is indicted for perjury in any affidavit, or deposition, or for forgery with respect to any record (*x*).

(*p*) B. N. P. 235. The reason given by Buller, J., in this passage, why the proceedings in Chancery are not records, is sufficiently amusing. After stating that a record is "a memorial of what is the law of the nation," he adds, "now Chancery proceedings are no memorials of the laws of England, because the *Chancellor is not bound to proceed according to the law.*" As to rules of court not being records, see *R.* v. *Bingham*, (1829) 3 Y. & J. 109, 112, 114; 32 R. R. 750.

(*q*) See, as to decrees, B. N. P. 234, 235; as to bills and answers, *Ewer* v. *Ambrose*, (1825) 4 B. & C. 25; 3 L. J. (O.S.) K. B. 128; 28 R. R. 198; as to depositions in Chancery, *Highfield* v. *Peake*, (1827) Moo. & M. 109; 31 R. R. 722; as to affidavits, *Davies* v. *Davies*, (1840) 9 C. & P. 252; *Garvin* v. *Carroll*, (1847) 10 Ir. L. R. 323; as to rules of court, *Selby* v. *Harris*, (1698) 1 Ld. Raym. 745; *Duncan* v. *Scott*, (1807) 1 Camp. 102.

(*r*) *In re Tollemache, Ex parte Anderson*, (1885) 14 Q. B. D. 606; 54 L. J. Q. B. 283.

(*s*) *Ante*, § 439. *Post*, § 1598.

(*t*) B. N. P. 226—228.

(*u*) As to a possible third case, see *ante*, § 1448.

(*v*) 2 Ph. Ev. 129.

(*x*) B. N. P. 239: *R.* v. *Morris*, (1761) 2 Burr. 1189; *R.* v. *Benson*, (1810) 2 Camp. 508; *R.* v. *Spencer*, (1824) Ry. & M. 97; *Crook* v. *Dowling*, (1782) 3 Doug. 77; *Stratford* v. *Greene*, (1810) 2 Ball. & B. 296; *Garvin* v. *Carroll*, (1847) 10 Ir. L. R. 330; *Lady Dartmouth* v. *Roberts*, (1812) 16 East, 340, per Ld. Ellenborough and Le Blanc, J. In this last case the judges intimated an opinion, that the same strictness was necessary in actions for malicious prosecution; but this would seem to be a mistake. See B. N. P. 13; *Purcell* v. *M'Namara*, (1808) 1 Camp. 200.

In either of these cases, the original document,—unless it be shown that the prisoner has got possession of it, or that it has been lost or destroyed (*y*),—must be actually produced. On a trial, too, for perjury, the signatures of the defendant, and of the person whose name is attached to the jurat, must be proved (*z*); after which the court will presume that the oath was duly administered (*a*). For the purpose of ensuring the production of the original record, application should be made to the court to which it belongs, or to a judge or master, who will make the necessary order (*b*).

§ 1536. When an issue was raised as to the *existence of a record* which did *not belong to the same court*, the proof used to be by an *exemplification under the Great Seal*; in order to obtain which, if the record did not belong to the old Court of Chancery, a literal transcript of it was removed thither by certiorari; for that was regarded as the centre of all the courts, and there the Great Seal was kept. An exemplification was then transmitted by mittimus out of Chancery, to the court in which the cause was pending (*c*); and this seemed to be the proper mode of proof, where the existence of a judgment of one of the superior courts was put in issue in any County Court (*d*). The proper mode of proceeding now would be by the production of an office copy under Order XXXVII., rule 4 (*e*).

§ 1537. When the existence or contents of the record are *not directly in issue* it may be always proved by the second kind of exemplification, though practically recourse is seldom had to this medium of proof, where the record belongs to any Division of the Supreme Court. Both species of *exemplifications are proved by mere production*, as the judges are bound to take judicial notice of the seals attached to them (*f*); and they are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination (*g*). Indeed, an exemplification under the Great Seal is itself considered a record of the highest validity (*h*).

(*y*) *R.* v. *Milnes*, (1860) 2 F. & F. 10.

(*z*) See cases cited in last note but one.

(*a*) *R.* v. *Spencer*, (1824) 1 C. & P. 260; *R.* v. *Turner*, (1848) 2 Car. & K. 732.

(*b*) See *ante*, § 1532; *Crook* v. *Dowling*, *supra*; *Bastard* v. *Smith*, (1839) 10 A. & E. 214; 8 L. J. Q. B. 244; 50 R. R. 387; *Bentall* v. *Sidney*, (1839) *id.* 164. The application to the court for leave to take an affidavit off the file, in order to prosecute the defendant for perjury, will be granted as a matter of right. *Stratford* v. *Greene*, (1810) 2 Ball & B. 294; *Keinan* v. *Boylan*, (1803) 1 Sch. & Lef. 232.

(*c*) B. N. P. 226 *b*; *Hewson* v. *Brown*, (1760) 2 Burr. 1034.

(*d*) *Winsor* v. *Durnford*, (1848) 12 Q. B. 603.

(*e*) Set out in full, *infra*, § 1538, which see further on this point.

(*f*) *Ante*, § 6.

(*g*) B. N. P. 226 *b*, 228.

(*h*) *Id.*

§ 1538. An *office copy* of a record,—by which is meant a copy authenticated by a person intrusted with the power of furnishing copies,—is admitted in evidence upon the credit of the officer without proof that it has been actually examined, and it has ever been regarded, even at common law, as equivalent to the record itself, when it was tendered as evidence in the same court, and in the same cause (*i*). It has now, however, acquired a far wider admissibility by virtue of the Rules of the Supreme Court, for Ord. XXXVII., R. 4, provides, that "office copies of all writs, records, pleadings, and documents filed in the High Court shall be admissible in evidence in all causes and matters, and between all persons or parties, to the same extent as the original would be admissible" (*k*). With respect to *affidavits*, the Rules further provide, that office copies of them, duly authenticated with the seal of the office, may, in all cases, be used, provided the originals have been duly filed (*l*); but the originals may, in some cases, be used before filing (*m*), and an office copy of an affidavit of discovery of documents is not required (*n*).

§ 1539. Under Order LXI., the Central Office of the Supreme Court is now divided, as has already been stated (*o*), into ten departments, which are respectively named:—1. Writ, appearance and judgment. 2. Summons and Order. 3. Filing and Record. 4. Taxing. 5. Enrolment. 6. Judgments and Married Women's acknowledgments. 7. Bills of Sale. 8. King's Remembrancer. 9. Crown Office. 10. Associates (*p*). Each of these departments has an official seal (*q*), and in all of them a vast number of documents are filed, enrolled, or otherwise deposited. Rule 7 of the Order then provides, that, "All copies, certificates, and other documents, appearing to be sealed with a seal of the Central Office, shall be presumed to be office copies or certificates or other documents issued from the Central Office, and, if duly stamped, may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

§ 1540. Independently of this general provision, office copies of some of the records of the Supreme Court and of the Central Office

(*i*) *Den* v. *Fulford*, (1761) 2 Burr. 1179; *Jack* v. *Kiernan*, (1840) 2 Jebb & Sy. 231, 237, 238; *Barron* v. *Daniel*, (1838) Cr. & D., Abr. C. 283.
(*k*) The Irish Ord. XXXVII., R. 4, is the same.
(*l*) Ord. XXXVIII., R. 15.
(*m*) *Id.*, and Ord. LXV., R. 27, sub-s. 53.
(*n*) Ord. LXV., R. 27, sub-s. 54.
(*o*) *Ante*, § 1491A.
(*p*) R. 1.
(*q*) R. 6.

are by statute rendered admissible in evidence in all courts. For example, the certificates of acknowledgments of deeds by married women, which are filed in No. 6 Department of the Central Office, may, by virtue of the Conveyancing Act, 1882 (*r*), be proved by office copies. So, when a search has been made, under the same Act, in the Central Office for entries of judgments, deeds, matters or documents, the proper officer must file a certificate setting forth the result of the search; and every such certificate may be proved by an office copy, and shall, in favour of a purchaser, furnish conclusive evidence "according to the tenour thereof," whether affirmative or negative (*s*). Again, any person may, under the Bills of Sale Act, 1878, and on paying the proper fees, have an office copy or extract of any bill of sale registered in the Central Office (*t*), and of the affidavit of execution filed therewith, or of any copy thereof with its accompanying affidavit, or of any registered affidavit of renewal; and any such copy shall, in all courts and before all persons, "be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon" (*u*). Under the Deeds of Arrangement Act, 1914 (*v*), any person is entitled to have an office copy of, or extract from, any deed registered under the Act upon payment of the proper fees, and any copy or extract purporting to be an office copy or extract is *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon.

§ 1542. It would be no easy matter to enumerate all the records and documents which formerly belonged to the old common-law side of the Court of Chancery, and were deposited in the Petty Bag Office (*x*); but among the most important may be mentioned the Parliament pawns, that is, the list of writs issued on calling new Parliaments, from the time of Henry VII.; the returns of Members to Parliament from the date of the Restoration; a few qualifications of Members of Parliament; The Bedford Level decrees; the decrees of Charity Commissioners from the reign of Queen Elizabeth; the commissions and inquisitions of lunacy and escheats from the time of Charles II.; the returns to writs for swearing in the old Masters Extraordinary of the Court of Chancery, and justices of the peace,

(*r*) 45 & 46 V. c. 39, s. 7, sub-s. 7 & 8.

(*s*) *Id.*, s. 2.

(*t*) Ord. LXI., R. 1.

(*u*) 41 & 42 V. c. 31, s. 16; 42 & 43 V. c. 50, s. 16. See *Emmott* v. *Marchant*, (1878) 3 Q. B. D. 555.

(*v*) 4 & 5 G. 5, c. 47, s. 25.

(*x*) See 37 & 38 V. c. 81, ss. 5, 10, which give power to abolish this office, and to transfer the muniments elsewhere. By R. S. C. Jan. 1889, the duties and powers of the clerk of the Petty Bag (except such as are by the Solicitors Act, 1888, directed to be performed by the Law Society) are vested in the senior clerk of the Crown Office Department of the Central Office.

and for electing coroners, verderors, and regardors; the returns to writs of scire facias, and a vast number of other writs which have issued from what used to be the common-law side of the Court of Chancery; and a considerable number of enrolments of patents and specifications, which, prior to the 1st of January, 1849, were enrolled in the Petty Bag Office.

§ 1543. While treating of office copies it will be proper to draw attention to a provision in the rules which regulate proceedings in divorce and matrimonial causes. All documents relating to any matter or suit depending in the Court for Divorce and Matrimonial Causes are now, in accordance with Rule 118, deposited in the Registry of the Court of Probate; and the registrar of that court is bound to permit searches and inspection, and to grant copies and extracts, as if the documents had reference to some disputed probate. Then comes Rule 119, which provides that "office copies or extracts furnished from the Registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required shall be certified under the hand of one of the principal Registrars of the Court of Probate to be an examined copy." Rule 120 adds, that "the seal of the court will not be affixed to any copy which is not certified to be an examined copy." Documents deposited with the Probate Division of the High Court are, in short, required to be proved by *examined* (*y*) copies, and not by mere *office* copies.

§ 1544. In Ireland, the officers of the superior courts are authorised, if not required, by statute (*z*), to furnish office copies of the proceedings of such courts, and these copies are "admissible in evidence in all causes and matters and between all persons or parties, to the same extent as the originals would be admissible" (*a*). The Act of 14 & 15 V c. 57 (Ir.), by section 107, enacts, that in every proceeding before the court of the assistant barrister, or of the judge of assise upon appeal, an office copy of any judgment, decree, or order, made by or before any court of law or equity in Ireland, certified to be a true copy by the proper officer of such court, shall, upon proof of such officer's handwriting, be deemed and taken as *primâ facie* evidence of such document. This clause sets at naught the valuable provisions of the Documentary Evidence Act, 1845, relating to the proof of copies (*b*).

§ 1545 The most usual mode of proving records is by an *examined copy*; and when this course is intended to be adopted, a witness must be produced, who will swear that he has compared

(*y*) As to which, see *infra*, § 1545.
(*a*) Ord. XXXVII., R. 4.
(*z*) See 7 & 8 V. c. 107, s. 11, and Sch.
(*b*) *Supra*, §§ 7, 8.

the copy tendered in evidence with the original, or with what the officer of the court, or any other person, read as the contents of the record, and that such copy is correct (*c*). It is not necessary for the persons examining to exchange papers, and read them alternately both ways (*d*); but it is necessary that the copy should be an accurate and complete copy, and, therefore, if it contains abbreviations where, in the original, words were written at length, it cannot be received (*e*). Moreover, if the record be written or printed in an ancient or foreign character, the witness, who has compared the copy with it, must have been able to read and understand the original (*f*). It must also appear in all these cases, that the record from which the copy was taken was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept. And this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found (*g*).

§ 1546. The records or judicial proceedings of the old Admiralty Court (*h*), of the Ecclesiastical Courts (*i*), and of the Courts of Quarter Sessions, may be proved, either by producing the originals, or by means of exemplifications, whether under the Great Seal or under the seals of the respective courts, which seals require no proof (*k*), or by office copies in the same cause and the same court (*l*), or by examined copies in any court (*m*). Indeed, these modes of proof are generally available with respect to the judgments or other proceedings of all inferior courts of record (*n*); and even where the court is not one of record and where short notes of its proceedings are alone kept, these notes, being considered as public documents, may be proved by examined copies (*o*). Where the existence of a record or judgment of any of the inferior common-law courts is put in issue in some cause in the King's Bench Division, the party who has to produce the document questioned, may move that court for a

(*c*) *Reid* v. *Margison*, (1808) 1 Camp. 469; *Gyles* v. *Hill*, (1809) *id.* 471, n.; *M'Neil* v. *Perchard*, (1795) 1 Esp. 264; *Fyson* v. *Kemp*, (1833) 6 C. & P. 71; *Rolf* v. *Dart*, (1809) 2 Taunt. 51; *R.* v. *M'Donald*, (1841) Arm. M. & O. 112; *R.* v. *Hughes*, (1839) 1 Cr. & D., C. C. 13; *Hill* v *Packard*, (1830) 5 Wend 387; *Lynde* v. *Judd*, (1807) 3 Day, 499.

(*d*) Cases cited in last note.

(*e*) *R.* v. *Christian*, (1842) Car. & M. 388.

(*f*) *Crawford and Lindsay Peer.*, (1848) 2 H. L. C. 534, 544, 545; 81 R. R. 269.

(*g*) *Adamthwaite* v. *Synge*, (1816) 1 Stark. 183; 16 R. R. 804.

(*h*) See 3 & 4 V. c. 65; 24 & 25 V. c. 10; 30 & 31 V. c. 114. Both the last-mentioned Acts are amended by 57 & 58 V. c. 60.

(*i*) See 6 & 7 V. c. 38, s. 14.

(*k*) *Ante*, § 6.

(*l*) *Ante*, § 1538.

(*m*) *R.* v. *Hains*, (1695) Comb. 337, per Holt, C.J.

(*n*) *Id.*

(*o*) *Id.*

certiorari; and on the issuing of this writ, a literal transcript of the document, under the seal of the inferior tribunal, will be returned directly into the court, and will be sufficient to countervail the statement of defence denying the existence of the original (*p*).

§ 1547. In extending to the records and other judicial proceedings of all inferior courts the above common-law modes of proof, it must not be forgotten that, in a few instances, special statutes have been passed with a view of facilitating the proof, either of the records or other proceedings of particular tribunals, or of particular records and documents. These Acts, however, by rendering admissible a convenient species of evidence, do not thereby deprive parties of the right of having recourse to any other mode of proof allowable at common law; or, in other words, the statutable methods of proof are cumulative, and not substitutionary; since it is a doctrine founded on common sense, largely sanctioned by authority, and especially applicable where the common law is concerned, that, unless the enactment of a new provision clearly indicates an intention by the Legislature to abrogate the old law, both shall be understood to stand together, provided their so doing would not be impossible or obviously absurd (*q*).

§ 1548 Subject to these observations, a reference may now be made to the Acts in question; and, first, as to the Bankruptcy Act, 1914 (*r*), which regulates in great measure the proof of the proceedings of the Courts of Bankruptcy (*s*). This statute enacts,

(*p*) *Woodcraft* v. *Kinaston*, (1742) 2 Atk. 317; *Butcher's Case*, (1601) Cro. Eliz. 821.

(*q*) *Escott* v. *Mastin*, (1842) 4 Moore P. C. 130, 131; *Northam* v. *Latouche*, (1829) 4 C. & P. 140; 8 L. J. (O.S.) C. P. 62; *R.* v. *Carter*, (1845) 1 Den. C. C. 65; *Edwards* v. *Buchanan*, (1832) 3 B. & Ad. 788; 1 L. J. K. B. 217.

(*r*) 4 & 5 G. 5, c. 59. As to the Bankruptcy (Scotland) Act, 1913, see *post*, § 1559.

(*s*) The Irish Bankrupt and Insolvent Act, 1857, 20 & 21 V. c. 60, enacts in section 361, that "every petition of bankruptcy, petition of insolvency, schedule, adjudication, petition for arrangement between a debtor and his creditors, appointment of assignees, certificate, deposition, order, document or other proceeding in bankruptcy or insolvency, or under any such petition for arrangement, appearing to be sealed with the seal of the court, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place or been made, without any further proof thereof; provided always, that all commissions of bankrupt, depositions, and other proceedings under the same, which may have been entered of record before the commencement of this Act, and having the certificate of entry thereon, purporting to be signed by the person appointed to enter the same by the Act of the Irish Parliament, 11 & 12 G. 3, c. 8, and the Act 6 & 7 W. 4, c. 14, or his deputy, shall, without proof of the appointment or handwriting of such person, be received as evidence of the same, and of the same having been duly entered of record, and of such proceedings having respectively taken place."

in section 139 (*t*), that "any petition or copy of a petition in bankruptcy, any order (*u*) or certificate, or copy of an order or certificate, made by any court having jurisdiction in bankruptcy, any instrument, or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever."

§ 1549. Besides this general enactment, the Act, and the Rules made pursuant to section 132, contain several provisions, which facilitate the proof of particular documents, and enlarge their admissibility and effect. First, "A copy of the London Gazette, containing any *notice* inserted therein in pursuance of this Act, shall be evidence of the facts stated in the notice" (*v*). These notices,—which must all be gazetted by the Board of Trade (*x*),—are ten in number, and relate to, (1) Receiving orders; (2) First meetings; (3) Adjudications; (4) Approvals of compositions or schemes; (5) Intended dividends; (6) Dividends; (7) Applications for discharge; (8) Adjudications annulled; (9) Appointments of trustees, and (10) Orders on application for discharge. The Act next singles out two of these notices for special favour, and enacts in section 137, subsection 2, that "the production of a copy of the London Gazette containing any notice of a receiving order (*y*), or of an order adjudging a debtor bankrupt (*z*), shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date."

§ 1550. Again, the appointment of a trustee in a bankruptcy, and probably of a trustee when appointed in a composition, or a scheme of arrangement (*a*), will be conclusively proved by producing the certificate of the Board of Trade, declaring him to be such trustee (*b*). The appointment, too, of all official receivers, and assistant official receivers, by the same Board must be judicially noticed (*c*); and a certificate of the official receiver that a composition or scheme has been duly accepted by the creditors and approved by the court, is, "in the absence of fraud, conclusive as to its validity" (*d*).

§ 1551. On hearing any application for the discharge of a bankrupt the court is now required to "take into consideration a report

(*t*) See as to the former law, 24 & 25 V. c. 134, s. 203; 32 & 33 V. c. 71, s. 107.
(*u*) *R.* v. *Thomas*, (1870) 11 Cox C. C. 535, as to orders of adjudication.
(*v*) S. 137 (1).
(*x*) R. 354. But see Sched. I., R. 2, which directs the official receiver to gazette the notices of first meetings.
(*y*) S. 11.
(*z*) S. 18.
(*a*) See s. 16.
(*b*) S. 143; R. 327; F. 120.
(*c*) R. 306.
(*d*) S. 16 (14).

of the official receiver as to the bankrupt's conduct and affairs"; and for the purposes of this inquiry, the report is to be received,—contrary to the ordinary rules of justice,—as "primâ facie evidence of the statements therein contained" (*e*). So, when the Board of Trade has objected to the appointment of a trustee, and at the instance of the creditors has notified the objection to the High Court, any report of the grounds of the objection, when communicated by the board to the court, must be received as "primâ facie evidence of statements therein contained" (*f*).

§ 1552. Again, under Schedule 1 of the Act, Rule 26, the chairman (*g*) of every meeting of creditors is directed to "cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting"; and section 138, sub-section 1 of the Act then provides, that any such minute, "signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof." Sub-section 2 further enacts that, "until the contrary is proved, every meeting of creditors, in respect of the proceedings whereof a minute has been so signed, shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had."

§ 1553. The Act also contains an important regulation respecting affidavits; for it enacts by section 140, that, "subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the County Palatine of Lancaster, or before any registrar of a bankruptcy court, or before any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court, before a justice of the peace for the county or place where it is sworn, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the United Kingdom, before a magistrate, or justice of the peace, or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate, or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public)" (*h*). Rule 60

(*e*) S. 26 (6). (*f*) R. 328.

(*g*) The chairman has *prima facie* authority to decide all incidental questions requiring immediate decision, and his decision as entered on the minutes is *prima facie* correct; *In re Indian Zoedone Co.*, (1884) 53 L. J. Ch. 468; 26 Ch. D. 70.

(*h*) Where an affidavit or proof in bankruptcy is sworn abroad before a British consul or vice-consul a notarial certificate in verification of the signature and qualifica-

of the Bankruptcy Rules then provides, that "the court shall take judicial notice of the seal or signature of any person, authorised by or under the Act to take affidavits, or to certify to such authority" (*i*).

§ 1554. A simple mode of proving the records and proceedings (*k*) of the County Courts (*l*) is provided by the County Courts Act, 1888 (*m*), which, in section 28, enacts, "that the registrar of every court shall cause a note of all plaints and summonses, and of all orders, and of all judgments and executions, and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding (*n*), without any further proof." It has been held under this section, that the note entered by the Registrar of the County Court in his book cannot be contradicted by any entry made by the judge in his own minute book (*o*).

§ 1554A. The Summary Jurisdiction Act, 1879, provides for the keeping by the clerk of every such court of a register, and that extracts therefrom certified by him shall be evidence in any other court of summary jurisdiction (*p*).

§ 1555. Among the particular judicial documents the proof of which is facilitated by statute, may be mentioned the proceedings of courts-martial, which, by virtue of the Army Act, 1881, are rendered admissible in evidence on their mere production, if purporting to be signed by the President, and coming from the custody of the Judge Advocate-General, or of the officer having charge of them; and which may also be proved by copies purporting to be certified by such judge-advocate, or his deputy, or by such other officer as aforesaid (*q*).

tion of the consul or vice-consul is not required. *Re Magee*, (1885) 15 Q. B. D. 332; 54 L. J. Q. B. 394.

(*i*) See further as to the proof and admissibility of particular proceedings in bankruptcy, *post* §§ 1747, *et seq.*

(*k*) See *post*, § 1586 A.

(*l*) As to the mode of proving Civil Bill decrees in Ireland, see and compare 14 & 15 V. c. 57, ss. 10, 97, 114; 27 & 28 V. c. 99, s. 57, cited *post*, § 1572; *Alcorn* v. *Larkin*, (1842) Arm. M. & O. 367; and *Donagh* v. *Bergin*, (1842) *id.* 284.

(*m*) 51 & 52 V. c. 43.

(*n*) As, for instance, the regularity of the appointment of a deputy judge, *R.* v. *Roberts*, (1878) 14 Cox C. C. 101.

(*o*) *Dews* v. *Ryle*, (1851) 2 L. M. & P. 544; 20 L. J. C. P. 264; 87 R. R. 718.

(*p*) See 42 & 43 V. c. 49, ss. 22, 31 (6).

(*q*) 44 & 45 V. c. 58, s. 165.

Again, all summary convictions for offences against the Factory and Workshop Act, 1901 (*r*), may be proved by copies certified under the hand of the clerk of the peace. Under the Customs Consolidation Act, 1876, "Condemnation by any justice under the customs laws may be proved in any court of justice, or before any competent tribunal, by the production of a certificate of such condemnation, purporting to be signed by such justice, or an examined copy of the record of such condemnation certified by the clerk to such justice" (*s*).

§ 1556. The modes of authenticating the records and judicial proceedings of *foreign and colonial courts*, including those of the Channel Islands, India, and all other possessions of the British Crown, except Scotland (*t*), are now regulated by Lord Brougham's Evidence Act of 1851 (*u*), which in section 7 enacts, that all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign State, or in any British Colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved either by examined copies, or by copies authenticated as follows: that is to say, they must purport either to be sealed with the seal of the court to which the originals belong; or if there be no seal, to be signed by one of the judges of such court, who must also certify to the fact of there being no seal. When these provisions are complied with, no evidence is required either to authenticate the seal, signature, or certificate attached to the copy, or to prove the official character of the judge. If the foreign document, sought to be proved by a copy, does not fall within the language of the section just cited, evidence must be given that it is a public writing deposited in some registry or place, whence, by the law or the established usage of the country, it cannot be removed (*v*), and the copy must then be shown to have been duly examined.

§ 1557. Besides the section just referred to, Lord Brougham's Act (*x*) contains several clauses which greatly facilitate the proof of English documents in Ireland, of Irish documents in England, and of English and Irish documents in the Colonies. Thus, section 9 enacts, that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of

(*r*) 1 Ed. 7, c. 22, s. 147 (4).
(*s*) 39 & 40 V. c. 36, s. 263.
(*t*) 14 & 15 V. c. 99, ss. 18, 19.
(*u*) 14 & 15 V. c. 99, s. 7, cited *ante*, § 10.
(*v*) *Alivon* v. *Furnival*, (1834) 1 C. M. & R. 277, 291, 292; 3 L. J. Ex. 241; 40 R. R. 561; *Furnell* v. *Stackpoole*, (1831) Milw. 283—286.
(*x*) 14 & 15 V. c. 99.

the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." Section 10 enacts, that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same." Section 11 (*y*) enacts, that "every document, which, by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any court of justice in England or Wales or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British Colonies, or before any person having in any of such colonies, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

§ 1558. In conformity with section 10 it has been held, that an affidavit purporting to be sworn before a Master Extraordinary of the old Court of Chancery in Ireland, was admissible in evidence in this country, without proof of the signature or official character of such master (*z*).

§ 1559. Several clauses are inserted in the Bankruptcy (Scotland) Act, 1913 (*a*), to facilitate the proof, and to regulate the effect, of certain proceedings under that statute, which may be tendered in evidence before English or Irish tribunals. One very important section, relative to the mode of proving orders and decrees made under

(*y*) S. 11 is repealed as to British India, 38 & 39 V. c. 66.
(*z*) *In re Mahon's Trust*, (1852) 9 Hare, 459; 22 L. J. Ch. 75.
(*a*) 3 & 4 G. 5, c. 20.

the Scotch Bankruptcy Law, has been cited in an earlier chapter of this work (*b*), and two more remain to be noticed. Section 137 enacts, that the deliverance pronounced by the Lord Ordinary or the Sheriff, "discharging the bankrupt of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," "shall operate as a complete discharge and acquittance to the bankrupt in terms thereof, and shall receive effect within Great Britain and Ireland and throughout his Majesty's other dominions." Then section 70 enacts, that the act and warrant (*c*), which is granted by the Sheriff in confirmation of the trustee of a sequestrated estate, and which vests in the trustee the whole property of the debtor (*d*), "shall be an effectual title to the trustee to perform the duties hereby imposed on him, and shall be evidence of his right and title to the sequestrated estate for the purposes of this Act; and a copy of such act and warrant in favour of the trustee, purporting to be certified by the Sheriff Clerk, and to be authenticated by one of the judges of the Court of Session, shall be received in all courts and places within England, Ireland, and his Majesty's other dominions, as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures or of the official character of the persons signing, and shall entitle the trustee to recover any property belonging or debt due to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated."

§ 1560. The Legislature has interposed a special mode of proving some particular documents, when tendered in evidence as coming either from abroad, or from some place out of the jurisdiction of the court. For instance, the Extradition Act, 1870 (*e*), contains an express enactment, in section 14, that "Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in

(*b*) S. 170 of the Act, cited *ante*, § 13

(*c*) The form of the Act and Warrant is given in Sch. D. of the Statute, and is as follows :—

"*Act and Warrant on Confirmation of the Trustee.*

[Place and date.]

"The Sheriff of the county of [insert county] has confirmed and hereby confirms A. B. [name and designation], trustee on the sequestrated estate of C. D. [name and designation]; and the whole of the estates and effects, heritable and moveable, and real and personal, wherever situated of the said C. D., are transferred and belong to A. B. as trustee for behoof of the creditors of the said C. D. in terms of the Bankruptcy (Scotland) Act, 1913; and the said A. B. has, as trustee aforesaid, in terms of the said Act, full right and power to sue for and recover all estates, effects, debts, and money belonging or due to the said C. D.

(Signed) C. D., Sheriff Clerk."

(*d*) S. 97.

(*e*) 33 & 34 V. c. 52.

evidence in proceedings under this Act." Section 15 then further enacts, that "Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

"(1). If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

"(2). If the depositions, or statements, or the copies thereof, purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

"(3). If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the minister of justice, or some other minister of state; and all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof" (*f*).

§ 1561. When depositions have been duly authenticated under the Act just cited, no objection, as it would seem, can be urged against their admissibility, on the ground that they were not taken in the presence of the accused or in relation to the particular charge (*g*). All the above provisions relating to depositions extend to affirmations taken in a foreign State, and to copies of such affirmations (*h*).

§ 1562. Again, the Fugitive Offenders Act, 1881, which authorises the apprehension, committal, and return, of certain offenders, who have escaped from one part of his Majesty's dominions into another, enacts, that "depositions, whether taken in the absence of the fugitive, or otherwise, and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under that Act" (*i*), that is, in all proceedings before the committing magistrate. The statute then gives minute directions as to what shall constitute due authentication of these several documents (*k*), and adds a proviso, that nothing in the

(*f*) See *R.* v. *Ganz*, (1882) 51 L. J. Q. B. 419; 9 Q. B. D. 93.
(*g*) *In re Counhaye*, (1873) L. R. 8 Q. B. 410; 42 L. J. Q. B. 217.
(*h*) 36 & 37 V. c. 60, s. 4.
(*i*) 44 & 45 V. c. 69, s. 29.
(*k*) *Id.*

Act shall authorise the reception of any of them in evidence "against a person upon his trial for an offence" (*l*). The Acts of 11 & 12 V., c. 42 and 43,—which contain provisions for apprehending offenders who escape from one part of the United Kingdom to another, or from one county or place in England to another, and which empower any magistrate of the place to which an offender is supposed to have escaped to back the warrant for his apprehension,—appear to render it necessary, as a preliminary step towards giving such magistrate jurisdiction, that proof should be made on oath of the handwriting of the justice issuing such warrant (*m*).

§ 1563. Again, depositions taken under a writ of mandamus from the King's Bench Division in any place belonging to his Majesty out of the United Kingdom, respecting offences against the Acts for the abolition of the slave trade, may be read as evidence in that Division, on the trial of any indictment or information for these crimes, if they have been duly taken, and have also been returned to that Division, closed up and under the seal of two of the judges of the foreign court (*n*).

§ 1564. With the view, as it would seem, of facilitating the proof of crimes committed either at sea or abroad, a clause has been inserted in the Merchant Shipping Act, 1894 (*o*). The object of the enactment is to render such depositions as may have been taken abroad admissible in evidence, when the witness is not within the jurisdiction of the court where the trial is to take place. The language employed is as follows:—"(1) Whenever in the course of any legal proceedings instituted in any part of his Majesty's dominions before any judge or magistrate, or before any person authorised by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon due proof (*p*), if the proceeding is instituted in the United Kingdom, that the witness cannot be found in that kingdom, or if in any British possession, that he cannot be found in that possession, any deposition that the witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in his Majesty's dominions, or any British consular officer elsewhere, shall be admis-

(*l*) *Id.*

(*m*) See ss. 11—15 of 11 & 12 V. c. 42; and s. 3 of 11 & 12 V. c. 43.

(*n*) 6 & 7 V. c. 98, s. 4; 13 G. 3, c. 63, s. 40, has been repealed by 5 & 6 G. 5, c. 61, so far as India is concerned; *ante*, §§ 500—505. As to how far it is necessary to prove that they have been duly taken and returned, see *R.* v. *Douglas*, (1846) 13 Q. B. 42; 16 L. J. Q. B. 417.

(*o*) 57 & 58 V. c. 60, s. 691. As to the proof, admissibility, and effect of depositions taken in French ports with respect to offences under the Sea Fisheries Act, 1868, see 31 & 32 V. c. 45, s. 61, & Sched. 1, Art. 28; 46 & 47 V. c. 22, s. 30, 2 (*d*).

(*p*) See *R.* v. *Conning*, (1868) 11 Cox C. C. 134; *R.* v. *Anderson*, (1868) *id.* 154.

sible in evidence provided that, (a) if the deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom: and (b) if the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession: and (c) if the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused: (2) A deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer, before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof; (3) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition: and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified (*q*); (4) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the Legislature of any colony, so far as regards that colony, or interfere with the power of any colonial Legislature to make those depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible."

§ 1566. Order XXXVIII., R. 6, after regulating the mode of swearing and taking examinations, affidavits, and other documents (*r*), whether in his Majesty's foreign dominions, or in any foreign parts, goes on to provide that the seal or signature of the court, judge, notary, consul, or other person, attached (*s*) to such documents, shall be *judicially noticed* (*t*).

§ 1567. The Commissioners for Oaths Act, 1889 (*u*), enacts (*v*) that "Every British ambassador, envoy, minister, chargé d'affaires, and

(*q*) See *R.* v. *Stewart*, (1876) 13 Cox C. C. 296.

(*r*) Under these general words, a power of attorney executed in the British Honduras in the presence of a notary-public, has been proved in a Court of Equity by the production of the notary's certificate under his hand and official seal. *Armstrong* v. *Stockham*, (1855) 24 L. J. Ch. 176; 101 R. R. 861. See, also, *Hayward* v. *Stephens*, (1867) 36 L. J. Ch. 135.

(*s*) In *Haggitt* v. *Ineff*, (1854) 24 L. J. Ch. 120; 5 De Gex, M. & G. 910; 104 R. R. 343; the Court received an affidavit, which was sworn in the United States, before, and attested by, a notary-public, and to which was appended a certificate of the British consul at New York, stating that the notary held that office, and that his signature was entitled to credit. See, also, *Savage* v. *Hutchinson*, (1855) 24 L. J. Ch. 232; *Levitt* v. *Levitt*, (1865) 2 H. & M. 626; 144 R. R. 280; and *Lyle* v. *Ellwood*, (1872) L. R. 15 Eq. 67; 42 L. J. Ch. 80. But see *In re Earl's Trusts*, (1858) 4 K & J. 300; 116 R. R. 334.

(*t*) See, also, 5 & 6 G. 5, c. 59, s. 140.

(*u*) 52 V. c. 10. (*v*) S. 6.

secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting consul, pro-consul, and consular agent exercising his functions in any foreign place may, in that country or place, administer any oath and take any affidavit, and also do any notarial act which any notary public can do within the United Kingdom; and every oath, affidavit and notarial act administered, sworn, or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in any part of the United Kingdom " (*x*).

§ 1569. As the object of all these statutes was not to abrogate the old law, but to facilitate the administration of oaths abroad, the courts have determined, that a strict compliance with them is not always necessary, but that it will suffice if an affidavit taken abroad can be proved to have been sworn before some functionary, who was able to administer an oath in his own country (*y*).

§ 1570. Before any document, whether an original or a copy, can be received in evidence of a judicial proceeding, it must in general appear that the record or entry of such proceeding has been *finally completed*. For instance, in order to prove the finding of an indictment, either at the Assizes or Sessions, it will not be sufficient to produce the indictment itself indorsed, a true bill, or the minute-book of the clerk of the peace, or other officer of the court, in which that fact is entered; but the record must be formally drawn up, and proved in the regular way (*z*). So a judgment, whether interlocutory or final, of any Division of the High Court, cannot be proved by producing the minutes, from which it is to be made up, for, until it is actually made up, the judgment is no record (*a*). So, a verdict cannot, in general, be proved by putting in the Nisi Prius record with the postea indorsed, but a copy of the judgment rendered upon it must be produced; for it may be that the judgment was arrested, or that a new trial was granted (*b*). If the record itself

(*x*) See *In re Lambert*, (1866) L. R. 1 P. & D. 138; 35 L. J. P. & M. 64; overruling *In re Barnard*, (1862) 2 Sw. & Tr. 489; 31 L. J. P. & M. 89.

(*y*) *Kevan* v. *Crawford*, (1876) 45 L. J. Ch. 658; *In the goods of Fawcus*, (1884) 9 P. D. 241; 54 L. J. P. 47; *Brittlebank* v. *Smith*, (1884) 50 L. T. 491.

(*z*) *R.* v. *Smith*, (1828) 8 B. & C. 341; 6 L. J. (O.S.) M. C. 99; *Porter* v. *Cooper*, (1834) 6 C. & P. 354; 3 L. J. Ex. 330; *Cooke* v. *Maxwell*, (1817) 2 Stark. 183; 19 R. R. 700; *R.* v. *Thring*, (1832) 5 C. & P. 507.

(*a*) *Godefroy* v. *Jay*, (1827) 3 C. & P. 192; 6 L. J. (O.S.) C. P. 62; *R.* v. *Bellamy*, (1824) Ry. & M. 171; *Lee* v. *Meecock*, (1805) 5 Esp. 177; *R.* v. *Birch*, (1842) 3 Q. B 431; *Ayrey* v. *Davenport*, (1807) 2 N. R. 474; *R.* v. *Robinson*, (1839) 1 Cr. & D., C. C. 329. See *Fisher* v. *Dudding*, (1841) 9 Dowl. 872; 10 L. J. C. P. 325.

(*b*) B. N. P. 234; *Pitton* v. *Walter*, (1718) 1 Str. 162; *Lee* v. *Gansel*, (1774) 1 Cowp. 3; *Fitch* v. *Smallbrook*, (1661) T. Ray. 32; *Fisher* v. *Kitchingham*, (1742) Willes, 367; *Gillespie* v. *Cumming*, (1841) Long. & T. 181; *Jameson* v. *Leitch*, (1842)

be produced from the proper custody, it seems that no objection can be taken to it, on the ground that it has not yet been filed (*c*).

§ 1571. In stating that the formal record must generally be proved, it is not meant, as has sometimes been imagined (*d*), that the record must be enrolled at full length on parchment. It is true that in the superior courts this practice has long been established, but in several other courts a more simple method of making up records, and entering proceedings, prevails. Thus, in the House of Lords itself, the minutes of a judgment on the Journals constitute the judgment itself, and a judgment of that House may, consequently, be proved, either by an examined copy of the minute (*e*), or by producing a copy of the Journal in which it is entered, purporting to be printed by the authorised printer (*f*). So, the orders of Quarter Sessions respecting the removal of paupers may be proved by the paper book, in which the proceedings of the court have been entered by the clerk of the peace, or by a copy of it, provided the minutes sufficiently disclose the jurisdiction of the court, and it be shown that, in practice, no other record of a more formal character is kept (*g*). If, however, this last fact be not proved, or if the jurisdiction of the court do not appear in the minutes, as, for instance, if the caption be omitted, neither the book nor the copy can be received (*h*).

§ 1572. Again, in all proceedings civil or criminal before the Civil Bill Courts in Ireland, the entry in the clerk of the peace's book of a decree or dismiss, is rendered by statute conclusive evidence of such a judgment having been pronounced, and it is unnecessary to produce the decree or dismiss signed by the chairman (*i*). Again, the proceedings of the ecclesiastical courts may be proved by the minute books in which they are entered, or by copies of such books, if it be shown that in practice they are never reduced into a more formal shape (*k*); and the same rule will prevail with respect to the

Milw. 688, 689; *Holt* v. *Miers*, (1839) 9 C. & P. 196. This rule seems to have been relaxed in two N. P. cases, *Foster* v. *Compton*, (1818) 2 Stark. 364; and *Garland* v. *Scoones*, (1798) 2 Esp. 648. *Sed qu.* See *post*, § 1573, as to some exceptions to the rule.

(*c*) *R.* v. *Shaw*, (1823) R. & R. 526.

(*d*) See 3 Bl. Com. 24; Co. Lit. 260 a.

(*e*) *Jones* v. *Randall*, (1774) 1 Cowp. 17.

(*f*) 8 & 9 V. c. 113, s. 3, cited *ante*, § 7.

(*g*) *R.* v. *Yeoveley*, (1838) 8 A. & E. 806; 8 L. J. M. C. 9. The orders of Justices forming a highway district, are provable by copies certified by the clerk of the peace, 27 & 28 V. c. 101, s. 12.

(*h*) *R.* v. *Ward*, (1834) 6 C. & P. 366, explained in *R.* v. *Yeoveley*, *supra*; *Giles* v. *Siney*, (1864) 11 L. T. 310.

(*i*) 27 & 28 V. c. 99, s. 57.

(*k*) *Houliston* v. *Smyth*, (1825) 2 C. & P. 25; 3 L. J. C. P. 100; 28 R. R. 609; *R.* v. *Hains*, (1695) Comb. 337.

orders of the Metropolitan Police Magistrates (*l*), and to the judgments and other proceedings of courts-baron (*m*), sheriff's courts (*n*), mayor's courts (*o*), and other courts of inferior jurisdiction (*p*). Indeed, with respect to such courts of inferior jurisdiction as are not courts of record, it seems that their judgments may be proved by the officer of the court, or any other competent person, if it appear that, in fact, no entry of them has been made in any official book (*q*). Thus, where a railway Act, after empowering owners of lands to claim compensation from the company, the amount in case of dispute to be settled by a sheriff's jury, directed that the verdicts and judgments thereon should be deposited with the clerk of the peace for the county among the records, and should be deemed records, the Court held that, on proof of non-compliance with this direction, parol evidence of such a verdict, and of the grounds on which it proceeded, might be given, and the under-sheriff was called for this purpose (*r*).

§ 1573. The rule requiring the record or judicial entry to be formally completed, before either the original or a copy can be admitted in evidence, is subject, as it would seem, to *three exceptions*. First, when the object is to show to any particular court, that some trial has been held or other proceeding has occurred before the same court while sitting under the same commission, a minute of the former proceeding will be admitted in lieu of the record, because, in this case, the formal record cannot be presumed to have been made up (*s*). Secondly, the same course will be allowed, where, in consequence of some ulterior proceedings in a cause having been taken, the record cannot, at the time when the evidence is required, have been regularly completed. The case of *R.* v. *Browne* (*t*) will illustrate this exception. That was an indictment for perjury on a trial at Nisi Prius, and in order to prove the trial, the Nisi Prius record was tendered. No postea was indorsed upon it, but merely a minute of the verdict in the handwriting of the associate. An objection being taken to this evidence, the court admitted it, on proof by the associate that a motion for a new trial was pending, and that until that rule was disposed of, the postea could not be

(*l*) *Lond. School Board* v. *Harvey*, (1879) 4 Q. B. D. 451; 48 L. J. M. C. 131; *Commissioners of Police* v. *Donovan*, [1903] 1 K. B. 895; 72 L. J. K. B. 545.

(*m*) *Dawson* v. *Gregory*, (1845) 7 Q. B. 756; 14 L. J. Q. B. 286.

(*n*) *Arundell* v. *White*, (1811) 14 East, 218—220.

(*o*) *Fisher* v. *Lane*, (1771) 2 W. Bl. 834.

(*p*) *R.* v. *Hains*, (1695) Comb. 337.

(*q*) *Dyson* v. *Wood*, (1824) 3 B. & C. 449, 451.

(*r*) *Manning* v. *East Coast Ry.*, (1843) 12 M. & W. 237, 243, 249; 13 L. J. Ex. 265; 67 R. R. 318.

(*s*) *R.* v. *Tooke*, (1794) 25 How. St. Tr. 446—449; recognised in *R.* v *Smith*, (1828) 8 B. & C. 343; 6 L. J. (O.S.) M. C. 99; *R.* v. *Robinson*, (1839) 1 Cr. & D., C. C. 329; *R.* v. *Reilly*, (1843) Ir. Cir. R. 795.

(*t*) (1829) 3 C. & P. 572.

indorsed. Perhaps, however, it was unnecessary to prove this last circumstance; for, thirdly, where the object of the evidence is merely to establish the fact that a certain judicial proceeding has taken place, as, for instance, that a trial has been had, a verdict given, or a writ issued, without regard to the facts disputed at the trial, found by the jury, or mentioned in the writ, and irrespective of all ulterior proceedings in the cause, it has been held that the record need not be formally drawn up (*u*). Thus, the postea indorsed on the Nisi Prius record will be sufficient evidence of a trial, to let in the testimony of a witness since deceased (*v*), or, perhaps to support an indictment against a witness for perjury (*x*); and where the fact that a writ has issued is mere matter of inducement, that fact may be proved by producing the writ, though it has not been returned, and is, consequently, not a record (*y*). So, when a prisoner was indicted at the Central Criminal Court for perjury committed by him on a trial held at the same court some six months before, the production by the officer of the court of the caption, the indictment with the indorsement of the prisoner's plea, the verdict, the sentence, and the minutes of the trial as made by the officer, was held to be sufficient evidence of the trial, without the production of the record, or of any certificate of it, either under section 13 of 14 & 15 V. c. 99, or under section 22 of 14 & 15 V. c. 100 (*z*).

§ 1574. In proving records, it is sometimes a question of nicety to determine how much of the proceedings must be given in evidence: and as the practice in this respect differs widely according to the object for which the evidence is tendered, it is difficult to lay down any distinct rule. It may, however, be stated broadly, that where the object is merely to prove the existence of the record in question, that fact may be established by producing the document alone; but if the record be relied upon as proof of certain facts stated therein, or adjudicated thereby, all the proceedings which are necessary, either to render valid, or to explain, the particular document, must, in general, be put in evidence. For instance, if *a decree in Chancery* is offered,

(*u*) B. N. P. 234; *Pitton* v. *Walter*, (1718) 1 Str. 162; *Fisher* v. *Kitchingman*, (1742) Willes, 367.

(*v*) *Pitton* v. *Walter*, (1718) 1 Str. 162.

(*x*) *R.* v. *Browne*, (1829) 3 C. & P. 572; *R.* v. *Coppard*, (1827) Moo. & M. 118. See *R.* v. *Page*, (1798) 2 Esp. 649, n.; and *R.* v. *Gordon*, (1842) Car. & M. 410, in which case it was held by Ld. Denman, that an allegation in an indictment for perjury that judgment was "entered up" in an action, was proved by producing from the judgment office the book in which the inscription was entered. But see *R.* v. *Thring*, (1832) 5 C. & P. 507; and *R.* v. *Robinson*, (1839) 1 Cr. & D., C. C. 329, where it was held that, on an indictment for perjury in a prosecution, the record of the former trial must be made up.

(*y*) B. N. P. 234.

(*z*) *R.* v. *Newman*, (1852) 2 Den. C. C. 390; 21 L. J. M. C. 75. See *post*, §§ 1612, 1613. S. 22 of 14 & 15 V. c. 100 has been repealed by the Perjury Act, 1911 (1 & 2 G. 5, c. 6).

merely to prove that it was in fact made, here, as in the case of verdicts (*a*), no proof of any other proceeding is required (*b*); but if a party intends to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must generally prove, not only the decree, but the pleadings upon which it was founded; because, without such proof, it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it (*c*). Where the pleadings are fully recited in the decree, this reasoning does not apply; and, consequently, it has more than once been held that, in that case, the production of the decree alone will be sufficient (*d*). On one occasion it was strenuously contended, that the depositions referred to in a decree must also be read as part of the record; but the court ruled otherwise, observing, that it is from the pleadings only that the questions in dispute are collected, and that the sole object of referring to the depositions, is to bring the same facts before a court of appeal, if necessary (*e*).

§ 1575. Again, *a judgment of the Ecclesiastical Court* cannot be made evidence without producing the libel and answer and the defensive allegations (*f*); and on the same principle, if an appeal from such judgment has been heard, the decree of the court of appeal cannot be admitted, without proving that court to have been duly in possession of the suit, by producing the process of appeal, that is, the transcript of the proceedings sent from the court below (*g*). The same rules apply to sentences in the Admiralty Division of the High Court, and to judgments in courts-baron and other inferior courts (*h*). Whether an adjudication by the late Insolvent Debtors' Court for the discharge of a prisoner, could be received as evidence of his insolvency, without putting in his petition and schedule, is a question on which the authorities differ (*i*); though, on strict principle, such evidence would seem to be inadmissible.

(*a*) *Ante*, § 1573.

(*b*) *Jones* v. *Randall*, (1774) 1 Cowp. 18; B. N. P. 235; *Blower* v. *Hollis*, (1833) 1 Cr. & M. 393; where it was held, that an order for an attachment for not paying costs of an equity suit, was alone *prima facie* evidence that a suit had been pending.

(*c*) *Blower* v. *Hollis*, (1833) 1 Cr. & M. 396; 2 L. J. Ex. 176; *Leake* v. *Mayor of Westmeath*, (1841) 2 M. & Rob. 397; 62 R. R. 813; *Attwood* v. *Taylor*, (1840) 1 M. & Gr. 289, 290; 56 R. R. 314.

(*d*) *Wheeler* v. *Lowth*, (1710) Com. Dig., tit. Ev. C. 1; *Wharton Peer.*, (1845) 12 Cl. & Fin. 301, 302; 69 R. R. 84.

(*e*) *Laybourn* v. *Crisp*, (1838) 4 M. & W. 320, 326—328; 8 L. J. Ex. 118; 51 R. R. 607.

(*f*) *Leake* v. *M. of Westmeath*, *supra*. This case virtually overrules *Stedman* v. *Gooch*, (1793) 1 Esp. 6, 8.

(*g*) *Leake* v. *Mayor of Westmeath*, *supra*.

(*h*) Com. Dig., tit. Ev. C. 1.

(*i*) In *M'Kee* v. *Farnam*, (1841) 2 Cr. & D. C. C. 209, Torrens, J., rejected the adjudication; but in *Brennan* v. *Dillane*, (1843) Ir. Cir. R. 853, Ball, J., admitted

§ 1576. *Depositions in Chancery*, taken under the old system, cannot in general be read, without proof of the bill and answer, in order to show that a cause was depending, as well as who were the parties, and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits; and if there were one, the depositions cannot be read, unless the cause was against the same parties or those claiming in privity with them (*k*). Still, the bill and answer, by being so put in, do not become evidence to be submitted to the jury, and the opposite counsel has consequently no right to read or refer to them in his address; for the judge only is to look at them, for the purpose of determining whether the depositions are evidence, by seeing what was in issue in the suit (*l*). Moreover, no proof of the bill or answer is necessary, where the deposition is used against the deponent as his own admission, or for the purpose of contradicting him as a witness (*m*).

§ 1577. Where a party relies upon depositions taken prior to 1852 in England (*n*), or 1867 in Ireland (*o*), he must read the interrogatories as well as the answers, unless he can prove that the former are lost or destroyed (*p*), and it seems that he must also read as part of his case the whole depositions, including the cross-interrogatories and answers thereto (*q*). Depositions taken since those dates, whether under the present (*r*) or the preceding system, are not open to these niceties (*s*); for the oral examination of the witness is "taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness" (*t*). The party, however, who seeks to put these depositions in evidence, must remember that they ought,—except under special circumstances (*u*),—to be written by or in the presence of the examiner, and further, that they must be authenticated by his signature, and must also be transmitted by him to the Central Office, to be there filed (*v*). Proof, therefore, must be forthcoming that these regulations have been complied with, if the admissibility of the deposi-

that document without the petition, though he required the production of the schedule. This last decision is said to have been followed by Jackson, J., in a later case, *id.*

(*k*) *Laybourn* v. *Crisp*, *supra*; *Blower* v. *Hollis*, (1833)1 Cr. & M. 396, Maule, argu.; 2 Ph. Ev. 149; B. N. P. 240; *Nightingal* v. *Devisme*, (1770) 5 Burr. 2594.

(*l*) *Chappell* v. *Purday*, (1845) 14 M. & W. 303; 14 L. J. Ex. 258; 69 R. R. 298.

(*m*) *Highfield* v. *Peake*, (1827) Moo. & M. 109; 31 R. R. 722.

(*n*) When 15 & 16 V. c. 86, passed.

(*o*) When 30 & 31 V. c. 44, passed.

(*p*) *Rowe* v. *Brenton*, (1828) 8 B. & C. 765; 32 R. R. 524.

(*q*) *Temperley* v. *Scott*, (1832) 5 C. & P. 341; 1 L. J. C. P. 46, 111.

(*r*) Ord. XXXVII. r. 5, cited *ante*, § 506.

(*s*) *Fleet* v. *Perrins*, (1868) L. R. 3 Q. B. 536; 37 L. J. Q. B. 233.

(*t*) Ord. XXXVII. r. 12.

(*u*) *Bolton* v. *Bolton*, (1876) 2 Ch. D. 217; *Stobart* v. *Todd*, (1854) 23 L. J. Ch. 956; *Cooper* v. *Macdonald*, (1867) 36 L. J. Ch. 304.

(*v*) Ord. XXXVII. r. 16.

tions be disputed; but the original documents need not be produced, for it will suffice to put in evidence either examined copies of them (*x*), or copies certified as true copies by the officer to whose custody the originals are intrusted (*y*). The original depositions, and not certified copies only, must, however, have been transmitted and filed (*z*).

§ 1578. The depositions having been filed are to be printed (*a*). Where depositions have been filed before issue joined notice in writing of an intention to use them must be given within one month after issue joined, "or within such longer time as may be allowed by special leave of the court or a judge," by the party intending to use the same to his opponent (*b*).

§ 1579. The original depositions having been signed by the examiner are, as already stated, to be transmitted by him to the Central Office and there filed. They may be sent by post under seal, the envelope being addressed to the "Senior Master of the Supreme Court of Judicature, Central Office, Royal Courts of Justice," or to the "Senior Registrar of the Probate, Divorce and Admiralty Division, Somerset House," as the case may be. If posted in England no postage need be paid. When evidence is taken under the authority of a Letter of Request, the form of request determines the person to whom the depositions are to be returned—usually the Secretary of State for Foreign Affairs. Depositions of a witness must be transmitted complete and not in parts.

§ 1580. It is provided by rule 18 of Order XXXVII. that "except where by the order otherwise provided or directed by the court or a judge," no deposition is to be given in evidence, except by consent, unless the court is satisfied that the deponent is dead, beyond the jurisdiction of the court or unable from sickness or other infirmity to attend the hearing. It is not unusual for the judge in making the order for an examination to add a direction to the effect that proof of the absence of the witnesses to be examined from this country at the time of trial may be given by the affidavit of a solicitor or agent (*c*). Failing such a direction, the party against whom a deposition is offered in evidence may insist upon proof being given in accordance with the rule. The evidence must be given by a person

(*x*) *Fleet* v. *Perrins*, *supra*.

(*y*) 14 & 15 V. c. 99, s. 14, cited *post*, § 1599; *Reeve* v. *Hodson*, (1853) 10 Hare, App. xix.; 90 R. R. 547.

(*z*) *Clay* v. *Stephenson*, (1837) 7 A. & E. 185; 6 L. J. K. B. 211; 45 R. R. 708; *Atkins* v. *Palmer*, (1821) 4 B. & A. 377.

(*a*) Ord. LXVI. rr. 3, 5, 7.

(*b*) Ord. XXXVII. r. 24.

(*c*) See the forms of "long order" for a commission contained in App. K. to the R. S. C.

who can speak to the fact of his own knowledge (*d*). It is sufficient to prove that the witness whose deposition is tendered has been seen to start for Australia (*e*), but not that the witness was seen the night before the trial on an outward-bound vessel waiting for the captain to come on board (*f*). Less strict evidence that a witness is abroad is required in a case where a witness has been examined abroad than in a case where he has been examined in England on the ground that he was about to go abroad.

§ 1581. The mode of proving the *examination* of prisoners, and the *informations* or *depositions* of witnesses, which have respectively been taken by justices or coroners, in *criminal* cases, has already been explained in previous parts of this work (*g*).

§ 1582 (*h*). The return to *inquisitions* post mortem, and other inquisitions, surveys, extents, and the like, cannot *strictly* (*i*) be proved, without reading the commissions on which they depend (*k*); unless in cases of general concernment, when the commission will be regarded as a thing of such public notoriety as not to require proof (*l*).

§ 1583. To prove an *award*, it is not only necessary to produce and prove the due execution of that instrument, but the submission to reference must also be proved; for otherwise the authority of the arbitrator to decide the question between the parties does not appear (*m*). If the submission be by a written agreement, its execution by all the parties, including the party relying upon it, must be strictly proved (*n*); and that, too, though it has been made a rule of court, pursuant to one of its terms (*o*); but if the arbitrator has been appointed by any rule of court, judge's order, or order of Nisi Prius, in an action, then, on proving the award, and producing the rule or order of reference, a sufficient *prima facie* case will be made out; and it will not be necessary to show, by producing the record in the

(*d*) *Robinson* v. *Markis*, (1841) 2 M. & Rob. 375; 62 R. R. 809.

(*e*) *Varicas* v. *French*, (1849) 2 C. & K. 1008.

(*f*) *Carruthers* v. *Graham*, (1841) Car. & M. 5.

(*g*) As to examinations, *ante*, §§ 888—901; as to depositions, *ante*, §§ 479—494.

(*h*) Gr. Ev. § 515, in part.

(*i*) As to when this rule will be relaxed, see *post*, § 1585.

(*k*) *Evans* v. *Taylor*, (1838) 7 A. & E. 617; 7 L. J. Q. B. 173; 45 R. R. 775; B. N. P. 228; *Newburgh* v. *Newburgh*, (1712) 3 Bro. P. C. 553; Hubb. Ev. of Suc. 589, 590.

(*l*) *Sir Hugh Smithson's Case*, per Ld. Hardwicke, cited B. N. P. 228, 229.

(*m*) *Ferrer* v. *Oven*, (1827) 7 B. & C. 427; 6 L. J. (O.S.) K. B. 28; 31 R. R. 239; *Antram* v. *Chace*, (1812) 15 East, 209; *Brazier* v. *Jones*, (1828) 8 B. & C. 124; 6 L. J. (O.S.) K. B. 261. Arbitrations are now regulated by the Arbitration Act, 1889 (52 & 53 V. c. 49), which see generally on the subject.

(*n*) Cases cited in last note.

(*o*) *Berney* v. *Read*, (1845) 7 Q. B. 79.

original action, or otherwise, what specific matters were actually referred (*p*). If the submission contain a power to appoint an umpire, or to enlarge the time for making the award, and such power be acted upon, proof must be given of the instrument by which the umpire was appointed, or the time enlarged; and a mere recital in the award will not be evidence of these facts (*q*); neither can the appointment be proved by showing that the umpire had undertaken the duties belonging to his office, and had actually signed the award (*r*). As the executing an award is a judicial act, proof should be given in all cases where more than one arbitrator is appointed, that the signing by the joint arbitrators took place in the presence of each other (*s*); or if, under the terms of reference, the award is to be good although it be executed by a less number than all the arbitrators, still it must be shown that the arbitrator, who has not signed the instrument has had notice to attend the execution, and has omitted or refused to do so (*t*).

§ 1584. In the case of *awards by public officers*, a less rigid amount of proof will sometimes be deemed sufficient, and in the absence of evidence of any subsequent usage inconsistent with the award, the maxim, *omnia præsumuntur ritè esse acta*, will be held to apply (*u*). Thus, where commissioners, named in an Inclosure Act, and authorised thereby to stop up roads, provided two justices made an order to that effect, published their award, which recited such order, and by which they stopped up a certain public footpath, it was held, that this recital was sufficient *prima facie* evidence of a valid order, on proof of an ineffectual search for the instrument itself, and that the award must be taken to have been rightly made, unless some proof of enjoyment inconsistent with it could be given (*v*). The principle of this case has been carried much further by the Legislature; for awards made and confirmed by commissioners under many General Inclosure Acts of the present reign (*x*), are rendered conclusive evidence of a compliance

(*p*) *Gisborne* v. *Hart*, (1839) 5 M. & W. 50; 8 L. J. Ex. 197; 52 R. R. 624; recognised in *Dresser* v. *Stansfield*, (1845) 14 M. & W. 828; 15 L. J. Ex. 274.

(*q*) *Still* v. *Halford*, (1814) 4 Camp. 19; *Davis* v. *Vass*, (1812) 15 East, 97.

(*r*) *Still* v. *Halford*, *supra*.

(*s*) *Stalworth* v. *Inns*, (1844) 13 M. & W. 466; 14 L. J. Ex. 81; 67 R. R. 680; *Wright* v. *Graham*, (1848) 3 Ex. 131; 18 L. J. Ex. 29; *Eads* v. *Williams*, (1854) 4 De G. M. & G. 674;102 R. R. 326; *Lord* v. *Lord*, (1855) 5 E. & B. 404; 26 L. J. Q. B. 34; 103 R. R. 535.

(*t*) *White* v. *Sharp*, (1844) 12 M. & W. 712; 13 L. J. Ex. 215; *Wright* v. *Graham*, (1848) *supra*; *In re Beck & Jackson*, (1857) 1 C. B. (N.S.) 695; 107 R. R. 861.

(*u*) *R.* v. *Haslingfield*, (1814) 2 M. & S. 558; 15 R. R. 350; *Doe* v. *Gore*, (1837) 2 M. & W. 321; *Doe* v. *Mostyn*, (1852) 12 C. B. 268; 21 L. J. C. P. 178; *Heysham* v. *Forster*, (1829) 5 M. & R. 277. As to when such awards may be proved by certified copies, see *post*, § 1607.

(*v*) *Manning* v. *East Coast Ry.*, (1843) 12 M. & W. 237; 13 L. J. Ex. 265; 67 R. R. 318; *Williams* v. *Eyton*, (1858) 4 H. & N. 357; 28 L. J. Ex. 146; 118 R. R. 493.

(*x*) 8 & 9 V. c. 118; 9 & 10 V. c. 70; 10 & 11 V. c. 111; 11 & 12 V. c. 99.

with those Acts, and of all necessary notices and consents; nad everything specified in such awards is binding and conclusive on all persons (*y*).

§ 1585. In proving *ancient records*, the strict rules of evidence are sometimes relaxed. Thus, a document, purporting by its contents to be an exemplification of a commission issued by Queen Elizabeth, and produced from the proper place of deposit, has been allowed to be read, without any evidence of its being a true copy, though no seal was affixed to it, and the state of the parchment was such as to render it impossible to say whether the Great Seal had ever been appended (*z*). So, ancient depositions may be read without putting in the interrogatories (*a*), or the bills and answers to which they relate (*b*), or the commissions under which they were taken (*c*), if it be proved that search has been made for these documents, and that they cannot be found; and on the like proof, answers may, it seems, be received in evidence, though the bills be not forthcoming. So, ancient extents, surveys, or returns to inquisitions, which came from the proper custody, and which bore internal evidence of having been taken under due authority, have sometimes been admitted, especially when they were tendered as evidence of reputation, though the commissions on which their legality depended could not be found (*d*). Where, however, such documents contain no internal evidence of authenticity, they cannot be read, unless the commissions be produced from the proper depository (*e*); neither can they then, if there appears to have been any excess of authority, or any other irregularity in the proceedings, sufficiently serious to render them not only voidable but void (*f*). Whether a record be ancient or modern, it is of course allowable, after proof of its loss or destruction, to show its contents, as in the case of any other document, by secondary evidence (*g*).

§ 1586. Before leaving the subject of judicial proceedings, it is necessary to advert to certain documents, which, though emanating from courts of justice, are not strictly records, or such proceedings,

(*y*) See 8 & 9 V. c. 118, ss. 104, 105, 157.

(*z*) *Mayor of Beverley* v. *Craven*, (1838) 2 M. & Rob. 140; 62 R. R. 783.

(*a*) *Rowe* v. *Brenton*, (1828) 8 B. & C. 765; 32 R. R. 524.

(*b*) *Byam* v. *Booth*, (1814) 2 Price, 234, n.

(*c*) *Bayley* v. *Wylie*, (1807) 6 Esp. 85.

(*d*) *Rowe* v. *Brenton*, *supra*; *Doe* v. *Roberts*, (1844) 13 M. & W. 520, 531, 533; *Vicar of Kellington* v. *Trinity College*, (1747) 1 Wils. 170; *Alcock* v. *Cook*, (1829) cited 2 Ph. Ev. 149, n. 1; *Anderston* v. *Magawley*, (1726) 3 Br. P. C. 588; *Gabbett* v. *Clancy*, (1845) 8 Ir. L. R. 299.

(*e*) *Evans* v. *Taylor*, (1838) 7 A. & E. 617; 7 L. J. Q. B. 173; 45 R. R. 775. See *D. of Beaufort* v. *Smith*, (1849) 4 Ex. 450; 19 L. J. Ex. 97; 80 R. R. 659; *Freeman* v. *Read*, (1863) 4 B. & S. 174; 32 L. J. M. C. 226; 129 R. R. 705.

(*f*) *Vaux Barony*, (1836) Min. Ev. 67; *Powis Barony*, (1731) cited Cruise, Dign. c. 6, § 60; *Leighton* v. *Leighton*, (1720) 1 Str. 308; Hubb. Ev. of Succ. 590.

(*g*) *Ante*, §§ 428, *et seq.*

as, for the most part, are capable of being primarily proved by means of copies. First, *writs of execution and warrants of commitment*, until they are returned, must be proved by actual production, though, after their return, they become matters of record, and are, consequently, provable by copies (*h*). With respect to writs of summons under the Rules of the Supreme Court, these may be proved by the production, either of the originals, or of the copies filed by the officer of the court under Order V. r. 13, or, if the originals be lost, by copies authenticated by the court or a judge (*i*), and any one of these documents will furnish proper evidence of the institution of the action, to which they relate (*k*). When writs of summons or writs of execution have been renewed under the Rules of the Supreme Court (*l*), the fact of renewal may be proved by the production of the respective writs, provided they purport to be marked with the seal of the court, showing them to have been duly renewed (*m*). The renewal of a writ of execution may also be proved by a written notice to the sheriff signed by the party or his solicitor, and bearing the seal of the court, with the day, month, and year of renewal, impressed thereon (*n*). Next, a *certificate of a judge*, if not indorsed on a record, cannot, it seems, be proved by a copy, but the original must be produced, when the courts will judicially notice the signature, if it purport to be that of one of the judges of the Supreme Court, or of one of the old equity or common-law judges of the superior courts at Westminster (*o*). The *pleadings* in an action may be proved either by producing the originals, or by means of the copies filed with the officer of the court, under Order XLI. r. 1 (*p*). And all copies, certificates and other documents appearing to be sealed with a seal of the Central Office are presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, is required for the authentication of any such copy, certificate or other document (*q*).

§ 1586A. Questions of nicety often used to crop up in the High Court respecting the service of proceedings therein, and the mode of proving such service. The most important rules on this subject are

(*h*) B. N. P. 234. If the writ is the gist of the action it must be returned, *id.* As to inhibitions, citations, monitions, &c., arising out of appeals to the Privy Coun. from decisions of the Admi. or Eccl. Cts., see 6 & 7 V. c. 38, s. 9; amended by 53 & 54 V. c. 27.

(*i*) Ord. VIII. r. 3.

(*k*) *R.* v. *Scott*, (1877) 2 Q. B. D. 415; 46 L. J. M. C. 259.

(*l*) Ord. VIII. r. 1; Ord. XLII. r. 20.

(*m*) Ord. VIII. r. 2; Ord. XLII. r. 21.

(*n*) Ord. XLII. rr. 20, 21.

(*o*) 8 & 9 V. c. 113, s. 2, cited *ante*, § 7.

(*p*) *R.* v. *Scott*, *supra*. See also Ord. XXXVI. r. 30.

(*q*) Ord. LXI. r. 7.

as follows:—First, Order LXIV. r. 11. "Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be effected before the hour of five in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after five in the afternoon on any week-day except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall, for the like purpose, be deemed to have been effected on the following Monday" (*qq*).

R. 12. "In any case in which any particular number of days, not expressed to be clear days, is prescribed by these rules, the same shall be reckoned exclusively of the first day and inclusively of the last day."

R. 2. "Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christmas Day, and Good Friday shall not be reckoned in the computation of such limited time."

R. 3. "When the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."

Next, Order LXVII. r. 1. "Except in the case of an order for attachment, it shall not be necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited."

R. 2. "All writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, shall be sufficiently served if left within the prescribed hours (*r*), at the address for service of the person to be served as defined by Orders IV. and XII., with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at such address for service as aforesaid; provided that where service under this rule is made by registered post, the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof."

R. 3. "Notices sent from any office of the Supreme Court may be sent by post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service."

R. 4. "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give

(*qq*) Five was substituted for six by R. S. C. 4 Dec., 1917.
(*r*) See r. 11, cited above.

an address for service as required by Orders IV and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications, in respect of which personal service is not requisite, may be served by filing them with the proper officer."

R. 5. "Where personal service of any writ, notice, pleading, order, summons, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, the service shall be effected as nearly as may be in the manner prescribed for the personal service of a writ of summons."

R. 6. "Where personal service of any writ, notice, pleading, summons, order, warrant, or other document, proceeding, or written communication is required by these Rules or otherwise, and it is made to appear to the Court or a Judge that prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service (*s*), or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just."

R. 7. "Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications, which ought to be delivered to or served upon the party on whose behalf the notice is given, shall thereafter be delivered to or served upon such solicitor."

R. 8. "Where a person who is not a party appears in any proceeding either before the Court or in Chambers, service upon the solicitor in London by whom such person appears, whether such solicitor act as principal or agent, shall be deemed good service except in matters requiring personal service."

R. 9. "Affidavits of service shall state when, where, and how, and by whom, such service was effected."

Lastly, Order X. r. 1. "Every application to the Court or a Judge for an order for substituted or other service, or for the substitution of notice for service, shall be supported by an affidavit setting forth the grounds upon which the application is made."

§ 1586B. The service of any summons or process of the County Courts by a bailiff may be proved by indorsement on a copy of such document under the bailiff's hand, showing the fact and mode of such service; and any bailiff wilfully and corruptly indorsing any false statement on such copy shall incur the same penalties as if he had committed perjury (*t*).

(*s*) See Ord. X., cited below.

(*t*) 51 & 52 V. c. 43, s. 78.

§ 1586c. The proof of the service of *process* in *courts of summary jurisdiction* is now simplified by section 41 of the Summary Jurisdiction Act, 1879 (*u*); and as that enactment has a very wide operation, it may be thought desirable to set it out at length. It is in these words:—"In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorised to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document, may be proved by a solemn declaration taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same." The fee for taking any such declaration cannot exceed one shilling; the declaration may be in a form provided by rule, and any person wilfully making a false declaration in any material particular "shall be guilty" of perjury (*v*).

§ 1587. With respect to the Rules and Orders of the Supreme Court, the Rules of the old superior Common-law Courts, and the Orders of the old Court of Chancery, these may severally be proved in any court by the production of office copies, for such copies are given out by the officer in the usual course of his business (*x*). In practice, however, it is never necessary to have recourse to this mode of proof, all tribunals are now content to rely on the authenticity of any copy of the High Court, County Court, or Mayor's Court Rules purporting to be published as a portion of the authorised reports, or, indeed, printed by any printer of repute. It may, however, still be necessary to prove more strictly the general rules and regulations of some less known inferior courts, in which case if a printed copy

(*u*) 42 & 43 V. c. 49. See also 44 & 45 V. c. 24, s. 4, sub-s. 1, extending the operation of the section cited above to the proof of English process executed in Scotland, and Scotch process executed in England.

(*v*) By the Criminal Justice Administration Act, 1914 (4 & 5 G. 5, c. 58), s. 33, the provisions of this section are applied to proceedings in respect of the non-payment of rates.

(*x*) *Selby* v. *Harris*, (1698) 1 Ld. Raym. 745; *Duncan* v. *Scott*, (1807) 1 Camp. 102; *Streeter* v. *Bartlett*, (1848) 5 C. B. 562, 564; 17 L. J. C. P. 140; *Jack* v. *Kiernan* (1840) 2 Jebb & Sy. 233; *Mayor of Ludlow* v. *Charlton*, (1840) 9 C. & P. 242, 246, 247; 10 L. J. Ex. 75; 55 R. R. 794.

of such rules, &c., be made use of, it must be proved that it has received the sanction of such court (*y*).

§ 1588. The *probate* of a will is a copy of that instrument under the seal, either of the Ecclesiastical Court, or, since the 11th of January, 1858, of the Probate Court or Division, which copy is attached to a certificate, stating that the original will has been duly proved and registered, and that administration of the goods of the deceased has been granted to one or more of the executors named therein (*z*). This document,—which, in the event of the will being proved in solemn form of law, can only be granted after satisfactory evidence has been furnished to the court of adequate capacity on the part of the testator, of testamentary intention untainted by fraud, and of due execution (*a*),—constitutes the title-deed of the executor, without which his character cannot be recognised, and with which it cannot in general be impugned, in any court (*b*).

§ 1589. The primary mode of proving a probate is by producing either the document itself, when due notice will be taken of the seal (*c*), or the Act-book or register from the Probate Division (*d*), containing an entry that the will has been proved, and probate granted, or even a certified or examined copy of such book or register (*e*). If, indeed,—as was formerly the practice in some of the inferior spiritual

(*y*) In one case, where it appeared that the Insolvent Debtors' Court, now abolished, had ordered the printing and circulation of its rules for the guidance of its officers, Lord Tenterden admitted one of these printed copies as primary evidence, though the original rules under the seal of the court were kept at the court, and no proof was given that the copy produced had been compared with them. *Dance* v. *Robson*, (1829) Moo. & M. 294. In another case, however, where an officer of the same court produced what purported to be a printed copy of the rules of the court, and stated that he had obtained it from the clerk of the rules, and that he was in the habit of distributing similar copies as authentic documents, the court rejected the copy, as the witness could not otherwise vouch for its authenticity, and no evidence was offered that these printed rules had ever been sanctioned by the court: *R.* v. *Koops*, (1837) 6 A. & E. 198. In this case, *Dance* v. *Robson* was not cited.

(*z*) Toller on Ex. 58.

(*a*) *Jones* v. *Goodrich*, (1845) 5 Moore P. C. R. 19, 21, per Dr. Lushington.

(*b*) Toller on Ex. 74, 75; *Allen* v. *Dundas*, (1789) 3. T. R. 125; 1 R. R. 666; *Ryoes* v. *D. of Wellington*, (1846) 9 Beav. 579, 599, 601; 15 L. J. Ch. 461. As to the jurisdiction of the Probate Division to grant probate in the case of a married woman's will made in pursuance of a power, see *Barnes* v. *Vincent*, (1846) 5 Moore P. C. 201, cited *post*, § 1712. See, also, *Ward* v. *Ward*, (1848) 11 Beav. 377. As to the effect of the Probate Division sealing Scotch confirmations of executors, see 21 & 22 V. c. 56, ss. 12, 13. See, also, *Hawarden* v. *Dunlop*, (1861) 2 Sw. & Tr. 340; and *Hood* v. *Ld. Barrington*, (1868) Eq. 218.

(*c*) *Kempton* v. *Cross*, (1735) Rep. temp. Hardw. 108; *ante*, § 6.

(*d*) *Cox* v. *Allingham*, (1822) Jac. 514. So, the revocation of probate may be proved by the Act-book; *R.* v. *Ramsbottom*, (1787) 1 Lea. 25, n. See *ante*, § 425.

(*e*) *Davis* v. *Williams*, (1811) 13 East, 232; *R.* v. *Phillpott*, (1851) 2 Den. 308; 21 L. J. M. C. 18; *Dorrett* v. *Meux*, (1854) 15 C. B. 142; 23 L. J. C. P. 221; 100 R. R. 278; 14 & 15 V. c. 99, s. 14, cited *post*, § 1599.

courts (*f*),—no Act-book, or other separate record of the granting of probates, has been kept, but on the will itself a memorandum has been indorsed, stating that the executor has proved it, and that the probate has passed the seal; then, on proof of such former practice, and on production of the will with such indorsement, the title of the executor will be sufficiently established, without accounting for the non-production of the probate (*g*). But under no other circumstances will the original will be admitted as evidence of title to *personal* property (*h*). In the event of the probate being lost or destroyed, it seems that it may be proved by an examined copy (*i*); but in such case the practice of the Probate Division (*k*),—like that which used to prevail in the spiritual courts,—is to grant either an exemplification, or a certified copy of the entry of the Act-book or register, in which the grant of probate is recorded (*l*).

§ 1590 The granting *administration*, which,—like the granting of probate,—is the act of the Probate Division, may be proved by producing either the letters of administration under the seal of the court (*m*), or the Act-book or register containing a record of the grant, or an exemplification, or an examined or a certified copy of such record (*n*), or an official certificate of the grant (*o*); and either of these kinds of proof will be admissible as primary evidence (*p*).

§ 1591 (*q*). The next class of public writings to be considered consists of *official registers*, or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the

(*f*) For instance, the Bishop's Courts at Winchester and Wells, 7 A. & E. 240, 243.

(*g*) *Doe* v. *Mew*, and *Doe* v. *Gunning*, (1837) 7 A. & E. 240; 6 L. J. K. B. 229. See, also, *Gorton* v. *Dyson*, (1819) 1 Br. & B. 219.

(*h*) *Pinney* v. *Pinney*, (1828) 8 B. & C. 335; 6 L. J. (O.S.) K. B. 353; 32 R. R. 400; *R.* v. *Barnes*, (1816) 1 Stark. R. 243, per Le Blanc, J.; *Stone* v. *Forsyth*, (1781) 2 Doug. 707. *Qu.* the effect of the Land Transfer Act, 1897 (60 & 61 V. c. 65), ss. 1, 2, in extending this principle by parity of reasoning to real estate.

(*i*) *R.* v. *Hains*, (1695) Skinn. 584; *Hoe* v. *Nelthorpe*, (1697) 3 Salk. 154.

(*k*) 20 & 21 V. c. 77, s. 69, enacts, that "an official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this Act." See, also, 20 & 21 V. c. 79, s. 74.

(*l*) *Shepherd* v. *Shorthose*, (1719) 1 Str. 412. See *post*, § 1599.

(*m*) The seal is judicially noticed, *ante*, § 6.

(*n*) See *M'Kenna* v. *Eager*, (1875) I. R., 9 C. L. 79.

(*o*) See 20 & 21 V. c. 77, s. 69, cited above. See, also, 20 & 21 V. c. 79, § 74.

(*p*) *Kempton* v. *Cross*, (1735) Rep. temp. Hardw. 108, 109; *Elden* v. *Keddell*, (1807) 8 East, 187; 9 R. R. 404; *Davis* v. *Williams*, (1811) 13 East, 232. See *ante*, § 425, and *post*, § 1599. As to the admissibility of probates and letters of administration on the trial of causes.

(*q*) Gr. Ev. § 483, in great part.

course of their public duties, and under their personal observation. These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examining, of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly, because they are required by law to be kept, partly, because their contents are of public interest and notoriety, but principally, because they are made under the sanction of an oath of office, or, at least, under the sanction of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses (*r*).

§ 1592. To render any document admissible in evidence as an *official register*, it must be one which the *law requires to be kept for the public benefit* (*s*). Thus, a book produced from the office, now abolished (*t*), of the Secretary of Bankrupts, in which entries were made of the allowance of certificates, has been rejected, as it was not kept under the authority of any official order, nor were the entries made by any person in the course of his official duty (*u*). On the same ground, the book called "Arms and Descents of the Nobility," though produced from the Heralds' College, cannot be received in evidence (*v*). In like manner, a register of attendance kept by the medical officer of a union for the inspection of the guardians, in obedience to a rule of the Poor-Law Commissioners, has been held inadmissible; no credit being given to the officer in respect of the entries, but the book being merely intended as a check upon himself (*x*). So, Lord Denman has refused to admit the register of shipping kept at Lloyd's (*y*). So, a report stating the burthen of a foreign ship, and the number of the crew, which was made by the master to the authorities at the Custom-House, and

(*r*) 1 St. Ev. 230.

(*s*) In *Gleen* v. *Gleen*, (1900) 17 Times R. 62, an Army Medical Sheet, under Rule 208 of the Royal Army Medical Service Rules, showing that a man had been admitted to hospital suffering from a certain disease, was admitted as evidence of adultery.

(*t*) 15 & 16 V. c. 77, s. 1.

(*u*) *Henry* v. *Leigh*, (1813) 3 Camp. 499.

(*v*) Shrewsbury Peer, (1857) 7 H. L. C. 24; 115 R. R. 1; but in pedigree cases such books may sometimes be admissible: see *post*, § 1769.

(*x*) *Merrick* v. *Wakley*, (1838) 8 A. & E. 170; 7 L. J. Q. B. 190; 47 R. R. 544.

(*y*) *Freeman* v. *Baker*, (1833) 5 C. & P. 482; 3 L. J. K. B. 17; 39 R. R. 651. For a description of this book, see *Kerr* v. *Shedden*, (1831) 4 C. & P. 531, n. *a*. In *Bain* v. *Case*, (1829) 3 C. & P. 496, and in *Abel* v. *Potts*, 1800) 3 Esp. 242; 6 R. R. 826, this book was admitted; in the first-named case, to prove that the coast of Pern was in a state of blockade at a particular time, and in the other, as evidence of the capture of a vessel. See, also, *Richardson* v. *Mellish*, (1824) 2 Bing. 241; 3 L. J. (O. S.) C. P. 265; 27 R. R. 603, per Best, C.J.

was there filed, has been rejected, when tendered in evidence as a public document to prove the burthen of the ship; and the same fate has befallen a certificate filed at the Custom-House, which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage. In neither of these cases did it appear that the documents had been prepared by any official personage in the discharge of a public duty (*z*). So, the registers and records of baptisms and marriages formerly performed at the Fleet and King's Bench Prisons, at May Fair, at the Mint in Southwark and in certain other places, are inadmissible, on the ground that they were not compiled under public authority (*a*). So, a marriage register kept by a clergyman in Ireland, prior to the 31st of March, 1845, when the Irish Marriage Act came into operation, has, for a similar reason, been rejected (*b*). So, a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in the handwriting of a deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book (*c*). So, the birth, marriage, or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pursuant to the provisions of the Act of 3 & 4 V. c. 92 (*d*).

§ 1593. The same rule prevails with respect to *foreign* and *colonial registers*; that is, copies of such registers will be admissible only on proof that they are required to be kept, either by the law of the country to which they belong (*e*), or by the law of this country. In the absence of such proof, a copy of a baptismal register in Guernsey (*f*),—a copy of a certificate of baptism by the chaplain of

(*z*) *Huntley* v. *Donovan*, (1850) 15 Q. B. 96; 81 R. R. 523.

(*a*) *Read* v. *Passer*, (1794) 1 Esp. 213; 3 R. R. 696; *Doe* v. *Gatacre*, (1838) 8 C. & P. 578. These registers are now deposited in the office of the Registrar-General, pursuant to the Act of 3 & 4 V. c. 92, ss. 6, 20, which Act, however, does not render them receivable in evidence.

(*b*) *Stockbridge* v. *Quicke*, (1853) 3 Car & K. 305.

(*c*) *Davis* v. *Lloyd*, (1844) 1 Car. & K. 275, per Ld. Denman and Patteson, J. But see observations on this case, *ante*, § 701.

(*d*) *Whittuck* v. *Waters*, (1830) 4 C. & P. 375; 34 R. R. 813; *Newham* v. *Raithby*, (1811) 1 Phillim. 315; Ex. p. Taylor, (1820) 1 J. & W. 483. *In re Woodward*, *Kenway* v. *Kidd*, [1913] 1 Ch. 392; 82 L. J. Ch. 230. As to the Act, see *ante*, § 1530, and *post*, § 1602, n.

(*e*) See *Perth Peer.*, (1848) 2 H. L. C. 865, 873, 874, 876, 877; 81 R. R. 446; *Abbott* v. *Abbott & Godoy*, (1860) 29 L. J. P. & M. 57; 4 Sw. & Tr. 254.

(*f*) *Huet* v. *Le Mesurier*, (1786) 1 Cox, 275. On this case, Dr. Lushington observes that the evidence was rejected, "because it did not appear by what authority the register was kept. Supposing it had been proved that Guernsey was part of the diocese of Winchester, which it is, and that by ancient custom a register was required to be kept there, different considerations might have applied to the case. . . I am of opinion, that there is no ground of distinction, supposing the register had been kept by order of a competent authority, between registers kept in Guernsey and in this country." *Coode* v. *Coode*, (1838) 1 Curt. 766.

a British minister at a foreign court (*g*),—a copy of the marriage register kept in the Swedish ambassador's chapel at Paris (*h*), prior to the 28th of July, 1849 (*i*),—and a copy of the book kept at the British ambassador's hotel in Paris, wherein the ambassador's chaplain had made and subscribed entries of all marriages of British subjects celebrated by him (*k*),—have been rejected. But, on the other hand, an examined copy of a marriage register in Barbadoes has been admitted, it appearing that by the law of that colony such register was kept (*l*). So, by virtue of a special Act (*m*), a copy of the marriage registry, which used to be kept in the Ionian Islands, is receivable in evidence, if it purports "to be certified under the signature and official seal of the Secretary of the Lord High Commissioner."

§ 1594 (*n*). It is also deemed essential to the official character of these books, that the entries in them be made promptly, or, at least, without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed (*o*). Thus, a minister's entry of a baptism, which took place before he had any connexion with the parish, and of which he received information from the clerk, is inadmissible; as is also the private memorandum made by the clerk who was present at the ceremony (*p*). The court, however, will not reject an entry in a parish register, merely because it was not made contemporaneously, or because it was made or sanctioned by the incumbent, on information received from some other person; for it will be presumed that the incumbent, however he got his information, had satisfied himself of the fact before he authorised the entry. Thus, an entry in a parish book, which was kept at the parish church, of a burial in the workhouse cemetery within the parish, has been received in evidence, though it appeared that the incumbent sanctioned the entries on the faith of statements made by others, and not from his personal knowledge of the burials (*q*).

§ 1595. Official books and registers may be proved either by the production of the originals themselves or by copies (*r*). The highest

(*g*) *Dufferin Peer.*, (1848) 2 H. L. C. 47; 81 R. R. 24.

(*h*) *Leader* v. *Barry*, (1795) 1 Esp. 353.

(*i*) When the Act of 12 & 13 V. c. 68, for facilitating the marriage of British subjects in foreign countries, passed. This Act is now repealed and replaced by 55 & 56 V. c. 23.

(*k*) *Athlone Peer.*, (1841) 8 Cl. & F. 262; 54 R. R. 56.

(*l*) *Coode* v. *Coode*, *supra*.

(*m*) 27 & 28 V. c. 77, s. 7.

(*n*) Gr. Ev. § 485, as to first five lines.

(*o*) *Doe* v. *Bray*, (1828) 8 B. & C. 813; *Walker* v. *Wingfield*, (1812) 18 Ves. 443.

(*p*) *Id.*

(*q*) *Doe* v. *Andrews*, (1850) 15 Q. B. 756.

(*r*) A list of such documents most commonly met with will be found *post*, § 1600.

method of proof, and the only one which formerly existed at common law with regard to many such documents, is by production of the originals together with proof that they come from the proper repository (*s*). This method of proof, however, was not always insisted on by the common law, and in some cases is even not generally available (*t*). In practice, official books and registers and documents of a like nature are now always proved by means of examined or certified copies under the statutory provisions hereafter mentioned (*u*), unless the circumstances of the case render the examination by the court of the actual entry necessary to justice.

§ 1596. Besides official books and registers, there are certain other documents of a somewhat similar nature which the Legislature has provided may in certain circumstances be admitted in evidence on mere production; the provision above referred to as to copies does not, however, apply to these documents (*v*).

(*s*) *Atkins* v. *Hatton*, (1794) 2 Anst. 386; *Armstrong* v. *Hewett*, (1817) 4 Price, 216; *Pulley* v. *Hilton*, (1823) 12 Price, 625; *Swinnerton* v. *Marq. of Stafford*, (1810) 3 Taunt. 91. See *ante*, §§ 432 *et seq*; and §§ 659 *et seq*; and *Croughton* v. *Blake*, (1843) 12 M. & W. 208, as to the repository.

(*t*) See *post*, § 1598.

(*u*) 14 & 15 V. c. 99, s. 14, *post*, § 1599.

(*v*) Some of the principal of such documents are :—Documents under the *Army Act*, 1881 (44 & 45 V. c. 58), s. 172 (1), providing that all orders authorised by the Act "to be made by the Army Council, or by the Commander in Chief or Adjutant-General of the Forces in India, or by any general or other officer commanding . may be signified by an order, instruction, or letter under the hand of any officer authorised to issue orders on behalf of the Army Council or such Commander-in-Chief, Adjutant-General, etc."; and any such document purporting to be so signed, shall be evidence of the party signing being so authorised. By s. 163 (1) (*b*) of the same Act, any letter, return or other document respecting the service, non-service, or discharge of any person as a soldier is made evidence of the facts stated in such letter, etc., provided that, on production, it purports to be signed as in the sub-section mentioned. See also 8 Geo. 5, c. 6, 12 (1). So, also, any description return, within the meaning of s. 154 of the same Act, must be produced as an original document, but it will be evidence of the matters therein stated if it purport to be signed by a justice of the peace. *Company's Books*, where the company is subject to the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 V. c. 16), which contain, pursuant to s. 98, entries of the proceedings of the directors, of the committees of directors, and of the meetings of the company, where each entry purports to be signed by the chairman of the meeting. *Books of Companies*, to which the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) applies, if containing minutes purporting to be signed by the chairman, either of the meeting to which it relates, or of the next succeeding meeting, as, by s. 71, such minutes are to be evidence of the proceedings. (See also, §§ 1603, 1630). *Friendly Societies.*—By the Friendly Societies Act, 1896 (59 & 60 V. c. 25), s. 100, "every document bearing the seal or stamp of the central office shall be received in evidence without further proof; and every document purporting to be signed by the chief or any assistant registrar, or any inspector, or public auditor, or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature." *Merchant Shipping Documents.*—It being, by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), provided generally (s. 719) that "all documents purporting to be made, issued, or written by or under the direction of the Board of Trade, and to be sealed with the seal of the Board, or to be signed by their secretary, or one of their assistant secretaries, or

§ 1598. With respect to many such books and documents, the strictness of the common-law rule that their contents could only be proved by the production of the originals was not usually insisted upon; and indeed, the public inconvenience that would follow the removal of *books of general concernment*, has been felt to be so great, as to justify, and in some cases to compel, the introduction of secondary evidence (*x*). Such books belong to a particular custody, from which they are not usually taken but by special authority, granted only in cases where inspection of the book itself is necessary for the purpose of identifying it, or of determining some question arising upon the original entry, or of correcting an error, which has been duly ascertained. As, therefore, these books are, in general, not removable at the call of individuals, and as, moreover, being interesting to many persons, they might be required as evidence in different places at the same time (*y*), it has become a common-law axiom of almost universal application, that *whenever a book is of such a public nature as to be admissible in evidence on its mere production from the proper custody, its contents may be proved by an authentic copy* (*z*). So anxious are the judges not to break in upon this rule, founded as it is on public convenience, that even though the original document be in court, they will not require its production, but will admit the copy, provided its authenticity be established (*a*).

if a certificate by one of the officers of the marine department, shall be admissible in evidence in manner provided by this Act"; while provision as to the proof of regulations in force for preventing collisions at sea is made by s. 419 (5) of the same Act, cited *post*, § 1604. *The Metropolis Local Management Act*, 1855 (18 & 19 V. c. 120), s. 60, renders the minutes of proceedings of the Metropolitan Board of Works (which has now ceased to exist) and whose powers, duties, and liabilities are, by 51 & 52 V. c. 41, s. 40, transferred to the London County Council), admissible evidence, provided they purport to be signed by any two of the members present. *Public Baths.*—Books containing entries of the proceedings of the commissioners may under 9 & 10 V. c. 74, s. 13, be read as evidence if the originals are produced purporting to be signed by two commissioners. *Railway* documents are in many cases evidence, *e.g.*, documents that proceed from the commissioners if purporting to be signed by any one of such commissioners (36 & 37 V. c. 48, s. 30); the same rule applies to all documents relating to railways which now emanate from the Board of Trade, and which purport to be signed by one of the secretaries or assistant secretaries of the Board, or by some officer appointed by the Board to sign such documents (14 & 15 V. c. 64, s. 3; 31 & 32 V. c. 119, s. 39). *The Sea Fisheries Act*, 1883 (46 & 47 V. c. 22), s. 17, renders any document drawn up in pursuance of the 1st Sched. thereof admissible as evidence of the facts or matters therein stated, and under certain circumstances such facts may be certified officially, and such document or certificate will be admissible evidence without proof of the signature.

(*x*) *Mortimer* v. *M'Callan*, (1840) 6 M. & W. 67; 9 L. J. Ex. 73; 55 R. R. 503.

(*y*) This last reason does not seem to be very convincing. Any and every document capable of being used in evidence might conceivably be required in two or more places at the same time. But this criticism is confined to the particular reason given, and is not intended to cast any reflection upon the soundness of the rule itself.

(*z*) *Lynch* v. *Clerke*, (1696) 3 Salk. 154; *R.* v. *Hains*, (1695) Comb. 337; *Hoe* v. *Nathrop*, (1697) 1 Ld. Raym. 154.

(*a*) *Marsh* v. *Collnett*, (1798) 2 Esp. 665; 5 R. R. 763. See § 87, *ante*, as to an analogous rule, in not requiring a subscribing witness to an *ancient* deed or will to be called, even though present in court.

§ 1599. Now, an *examined copy*, duly made and sworn to by a competent witness, has ever been considered as "authentic," within the meaning of the above axiom (*b*); but the Legislature has also provided a more simple mode of proof, namely, by the production of a *certified copy*. The enactment by which this salutary change in the law has been effected, is contained in section 14 of Lord Brougham's Evidence Act of 1851 (*c*), and is in the following words:—"Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to a person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four-pence for every folio of ninety words." In conformity with this section, a copy of an entry in a local registry of births, certified under the hand of a "deputy superintendent registrar," has been received in evidence (*d*); and under the same enactment the now abolished (*e*) Clerk of Records and Writs was ordered by the court to furnish certified copies of any bills, answers, and depositions which were in his custody, and which were required to be used on the trial of a cause (*f*).

§ 1600. Among the public books and documents, the contents of which, in the absence of the originals, are now provable under the enactment just cited either by examined or by certified copies, may be mentioned the following:—parish registers (*g*); the deposit and transfer books of the Bank of England (*h*), and of the East India

(*b*) See *R.* v. *Mainwaring*, (1857) 26 L. J. M. C. 10; 7 Cox C. C. 192.

(*c*) 14 & 15 V. c. 99.

(*d*) *R.* v. *Weaver*, (1873) L. R. 2 C. C. R. 85; 43 L. J. M. C. 13.

(*e*) See 42 & 43 V. c. 78, Sched. 1; and R. S. C., Ord. LX., R. 3; Ord. LXI., R. 1.

(*f*) *Reeve* v. *Hodson*, (1853) 10 Hare, App. xix.; 90 R. R. 547, per Wood, V.-C.

(*g*) *Doe* v. *Barnes*, (1834) 1 M. & Rob. 386; 42 R. R. 809. *In re Porter's Trusts*, (1855) 25 L. J. Ch. 688; 105 R. R. 291; Wood, V.-C., held that an extract from a parish register, signed by the curate of the parish, was admissible. The same point was ruled by the Lords Justices in *Re Hall's Estate*, (1852) 22 L. J. Ch. 177, though that case is erroneously reported as a decision to the contrary in 2 De G. M. & G. 748; 95 R. R. 317.

(*h*) *Breton* v. *Cope*, (1791) Peake, 30; *Marsh* v. *Collnett*, *supra*; *Mortimer* v. *M'Callan*, *supra*.

Company (*i*); the books of the Customs, of the office of Inland Revenue (*k*), and of the Post Office (*l*); the rolls of courts baron (*m*); assessments of land-tax (*n*); poor-law valuations in Ireland (*o*); the books of entry, records, deeds, instruments, writings, maps, plans, and other official papers deposited in the office of Land Revenue Records and Enrolments (*p*); probably, poor-rate books (*q*); perhaps, rate books kept by the local authorities under the Public Health Act, 1875 (*r*); the by-laws of a railway company, made pursuant to the Railways Clauses Consolidation Act (*s*); perhaps the Middlesex Registry of Deeds (*t*); the Act-book and registers in the registry of the Probate Division (*u*); the official log-books kept by the masters of British ships in the manner directed by the Merchant Shipping Act, 1894 (*v*); the books of baptisms (*x*), marriages, and deaths in India which are deposited in the office of the Secretary for India (*y*); the register of marriages in the Ionian Islands, which has been transmitted to the Registrar-General by the Lord High Commissioner (*z*); the registers of marriages kept by British consuls abroad prior to the 28th of July, 1849 (*a*); foreign registers of marriage, on proof that

(*i*) 2 Doug. 593, n. 3; *Doe* v. *Roberts*, (1844) 13 M. & W. 532; 14 L. J. Ex. 274; 67 R. R. 714.

(*k*) 12 & 13 V. c. 1, s. 6. See 43 & 44 V. c. 19 and 53 & 54 V. c. 21.

(*l*) *Mortimer* v. *M'Callan, supra; Fuller* v. *Fotch*, (1695) Carth. 346.

(*m*) B. N. P. 247. Examined copies of court-rolls are admissible, though they are not the copies delivered to the tenant of the estate; *Breeze* v. *Hawker*, (1844) 14 Sim. 350.

(*n*) *R.* v. *King*, (1788) 2 T. R. 234. Those in the Record Office must be proved by certified copies, see *ante*, § 1533. See, also, *Doe* v. *Seaton*, (1834) 2 A. & E. 138; 4 L. J. K. B. 13; 41 R. R. 412; *Doe* v. *Arkwright*, (1833) 5 C. & P. 575; 38 R. R. 851.

(*o*) *Swift* v. *M'Tiernan*, (1848) 11 Ir. Eq. R. 602; *Welland* v. *Ld. Middleton*, (1844), *id.* 603; 15 & 16 V. c. 36; 23 & 24 V. c. 4, s. 9.

(*p*) *Doe* v. *Roberts, supra;* 2 & 3 W. 4, c. 1, s. 15, *et seq.*; 7 & 8 V. c. 89. As to the proof of Crown leases, &c., recorded in Scotland, see 36 & 37 V. c. 36, s. 5.

(*q*) *Justice* v. *Elstob*, (1858) 1 F. & F. 258. See, however, 32 & 33 V. c. 41, s. 18, cited *ante*, § 147A.

(*r*) But see 38 & 39 V. c. 55, s. 223, which simply enacts, that "the *production* of the books purporting to contain any rate or assessment made under this Act shall, without any other evidence whatever, be received as *prima facie* evidence of the making and validity of the rates mentioned therein."

(*s*) *Motteram* v. *East Coast Ry.*, (1859) 29 L. J. M. C. 57; 7 C. B. (N.S.) 58; 12 R. R. 373; 8 & 9 V. c. 20, §§ 108—111, cited *post*, § 1656.

(*t*) *Collins* v. *Maule*, (1838) 8 C. & P. 502; *Doe* v. *Kilner*, (1826) 2 C. & P. 289.

(*u*) See *Davis* v. *Williams*, (1811) 13 East, 232; *Dorrett* v. *Meux*, (1854) 15 C. B. 142; 23 L. J. C. P. 221; 100 R. R. 278. Entries in this book may also be proved by an exemplification; *ante*, § 1589.

(*v*) 57 & 58 V. c. 60, ss. 239—243.

(*x*) *Queen's Proctor* v. *Fry*, (1879) 4 P. D. 230; 48 L. J. P. 68.

(*y*) *Westmacott* v. *Westmacott*, [1899] P. 183; 68 L. J. P. 63; *Ratcliff* v. *Ratcliff and Anderson*, (1859) 1 Sw. & Tr. 467; 29 L. J. P. M. & A. 171, in which case, however, the original book was prodnced. See, also, Rep. of 1838, by Commiss. appointed to inquire into the state, &c., of non-parochial registers, p. 13.

(*z*) 27 & 28 V. c. 77, ss. 8, 10.

(*a*) 12 & 13 V. c. 68, s. 20, enacts, among other things, that "all marriages, both or one of the parties being subjects or a subject of this realm, which, before

they are required to be kept by the laws of the countries to which they respectively belong (*b*); Admiralty documents, including the log-books and muster books of his Majesty's ships, and even official letters lodged at the Admiralty (*c*); lists of convoy (*d*); books of the Sick and Hurt Office (*e*); the books kept by the coast-guard showing the state of the wind and weather (*f*); books of corporations containing their official proceedings and matters affecting their property, if the entries are of a public nature (*g*); ecclesiastical documents, such as bishops' registers and chapter-house registers (*h*); or terriers (*i*); lists of passengers which, in pursuance of an old statute, used to be transmitted by the captains of ships in the India trade to the court or directors of that company (*k*); registers of Parliamentary voters which are in the custody of the sheriffs or returning officers (*l*); some of the documents relating to the election of members of Parliament (*m*); public office books, and other official papers, including the books of the Customs (*n*); of what was formerly the Excise (*o*); of the Register Office of Merchant Seamen (*p*); and those kept at public prisons (*q*); and vestry books (*r*). It would seem that the

the 28th of July, 1849, have been solemnised according to any religious rites or ceremonies, or contracted *per verba de præsenti* in any foreign country or place, and *registered* by or under the authority of any British consul-general, consul, or vice-consul exercising his functions within such country or place, *the signatures of the parties being written in the register*, shall be deemed and held to be as valid in the law, and cognisable in the like manner, as if the same had been solemnised within her Majesty's dominions with a due observance of all forms required by law." This Act has now been repealed and replaced by the Foreign Marriage Act, 1892 (55 & 56 V. c. 23).

(*b*) *Burnaby* v. *Baillie*, (1889) 42 Ch. D. 282; 58 L. J. Ch. 842; *Abbott* v. *Abbott and Godoy*, (1860) 29 L. J. Pr. & Mat. 57; 4 Sw. & Tr. 254.

(*c*) *D'Israeli* v. *Jowett*, (1795) 1 Esp. 427; *Watson* v. *King*, (1815) 1 Stark. 121; 16 R. R. 790; *R.* v. *Fitzgerald*, (1741) 1 Leach, C. C. 20; *R.* v. *Rhodes*, (1742) 1 Leach C. C. 24; *Barber* v. *Holmes*, (1800) 3 Esp. 190. Most of these documents are now lodged at the Record Office, see *ante*, § 1485.

(*d*) *Richardson* v. *Mellish*, (1824) 2 Bing. 229; 3 L. J. C. P. 265; 27 R. R. 603, at p. 241, per Best, C. J.

(*e*) *Wallace* v. *Cook*, (1804) 5 Esp. 117.

(*f*) *The Catherina Maria*, (1866) L. R. 1 A. & E. 53.

(*g*) *Marriage* v. *Lawrence*, (1819) 3 B. & Ald. 412; 22 R. R. 326; *R.* v. *Mothersell*, (1707) 1 Str. 92; *Thetford's Case*, (1719) 12 Vin. Abr. 90, pt. 16; *Warriner* v. *Giles*, (1734) 2 Str. 954, 1223 *n.* 1.

(*h*) *Arnold* v. *Bp. of Bath and Wells*, (1829) 5 Bing. 316; 7 L. J. C. P. 120; 30 R. R. 613; *Coombs* v. *Coether*, (1829) Moo & M. 398; *Humble* v. *Hunt*, (1817) Holt, N. P. 601.

(*i*) B. N. P. 248; 1 St. Ev. 239.

(*k*) *Richardson* v. *Mellish*, *supra*.

(*l*) *Reed* v. *Lamb*, (1860) 6 H. & N. 75; 29 L. J. Ex. 47; 123 R. R. 392.

(*m*) 35 & 36 V. c. 23, Sch. I., Part I., r. 42.

(*n*) *Johnson* v. *Ward*, (1806) 6 Esp. 47; *Tomkins* v. *Att.-Gen.*, (1813) 1 Dow. 404; *Buckley* v. *U.S.*, (1846) 4 How. Sup. Ct. Rev. 258 (Am.).

(*o*) *Fuller* v. *Fotch*, (1695) Carth. 346; *R.* v. *Greenwood*, (1815) 1 Price 369.

(*p*) 57 & 58 V. c. 60, ss. 251, 256.

(*q*) *Salte* v. *Thomas*, (1802) 3 Bos & P. 188; *R.* v. *Aickles*, (1785) 1 Lea. 294, 297*n*, 300*n*.

(*r*) *R.* v. *Martin*, (1809) 2 Camp. 100.

rules of savings-banks cannot be proved, under Lord Brougham's Act, by certified copies, but that they are provable, either by the production of the originals deposited with the Commissioners for the reduction of the National Debt, or by examined copies (*s*).

§ 1601. As the section of Lord Brougham's Act, quoted above (*t*), refers only to such documents as are not provable by means of copies under any other statutable provision, it becomes necessary to enumerate the principal public registers and documents, certified copies of which are receivable in evidence, by virtue of some enactment having special reference to them. And here it must be recollected, that the mode of proof afforded by these particular statutes has been much simplified by the Documentary Evidence Act of 1845; and that provided the certified copies respectively purport to be duly signed or sealed, or otherwise authenticated in the manner pointed out by statute, they will in almost every case be now admitted in evidence, without proof of the seal, the signature, or the official character of the party certifying (*u*).

§ 1602. The following list,—contained in this and the next seven sections,—will, it is hoped, be found practically useful, as it refers to the principal documents which are provable by means of certified copies under particular Acts of Parliament (*v*). The registers of births, marriages, and deaths, made pursuant to the Registration Act of 1836 (*x*), as amended by the Births and Deaths Registration Act, 1874 (*y*); the register books kept under the Registration of Burials Act, 1864 (*z*); the non-parochial registers of births, baptisms,

(*s*) 26 & 27 V. c. 87, s. 4. "The copy of such rules deposited with the said commissioners, or a true copy thereof, examined with the original, and proved to be a true copy, shall be received as evidence of such rules respectively in all cases."

(*t*) *Ante*, § 1599.

(*u*) 8 & 9 V. c. 113, s. 1; cited *ante*, § 7.

(*v*) As to when certified copies of enrolments of instruments are admissible in evidence, see *post*, §§ 1649—1654.

(*x*) 6 & 7 W. 4, c. 86, s. 38, enacts, that "the Registrar-General shall cause to be made a seal of the said register office, and the Registrar-General shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and *all certified copies of entries purporting to be sealed or stamped* with the *seal* of the said *register office* shall be *received as evidence* of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry; and no certified copy, purporting to be given in the said office, shall be of any force or effect, which is not sealed or stamped as aforesaid." See, also, section 35, cited *ante*, § 1504, which authorises the clergyman, superintendent registrar, and other officers, to give certified copies of the local registers; but as the Act contains no provision for making such copies evidence, it may be doubtful whether they would be admissible, were it not for the Act of 14 & 15 V. c. 99, s. 14, cited *ante*, § 1599. See, also, the Marriage Act, 1898 (61 & 62 V. c. 58), s. 7 (5). See *R.* v. *Mainwaring*, (1856) 26 L. J. M. C. 10; 7 Cox, C. C. 192; *R.* v. *Weaver*, (1873) L. R. 2 C. C. R. 85; 43 L. J. M. C. 13.

(*y*) 37 & 38 V. c. 88, s. 32, cited *ante*, § 1504.

(*z*) 27 & 28 V. c. 97, ss. 5, 6.

marriages, deaths, and burials, which are deposited in the office of the Registrar-General, and certified extracts from which are admissible, under certain regulations as to notice, &c., in all civil proceedings (*a*), though in criminal cases the original register must be produced; the registers, muster-rolls, and pay lists, transmitted to the Registrar-General of Births and Deaths in England, in pursuance

(*a*) 3 & 4 V. c. 92, s. 9, enacts, that "the Registrar-General shall certify all extracts which may be granted by him from the registers or records deposited, or to be deposited, in the said office, and made receivable in evidence by virtue of the provisions herein contained, by causing them to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained."

Section 10 enacts, that "every extract granted by the Registrar-General from any of the said registers or records, shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the general register office under this Act; and the production of any of the said registers or records from the general register office, in the custody of the proper officer thereof, or the production of any certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the general register office under this Act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence."

Section 11 enacts, that "in case any party shall intend to use in evidence on the trial of any cause in any of the courts of common law, [*qu.* as to the meaning of these words since the passing of the Judicature Acts] or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such trial or hearing, if the judge or court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record, from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

Section 12 enacts, that "in case any party shall intend to use in evidence on such trial or hearing any original register or record (instead of such certified extract), he shall nevertheless, within a reasonable time, give to the opposite party notice of his intention to use such original register or record in evidence, and deliver to such opposite party a copy of a certified extract of the entry or entries, which he shall intend to use in evidence."

Section 13 enacts, that "in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause, in any court of equity [qu. as to the meaning of these words since the passing of the Judicature Acts], any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause, where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue, then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence, on the examination of witnesses or at the hearing of a cause (as the case may be), and shall at the same time deliver to the clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such

of the Registration of Births, Deaths, and Marriages (Army) Act, 1879 (*b*); the registers of the marriages of British subjects in foreign countries, which, since the 28th of July, 1849, have been kept by British consuls, and certified copies of which are annually transmitted through one of the Secretaries of State to the Registrar-General (*c*); the registers of births and deaths in Ireland (*d*); the register-books kept under the provisions of the statute passed in 1854 for the better registration of births, deaths, and marriages in Scotland (*e*); the register of irregular Scotch marriages (*f*); and the

certificated extract shall be received in evidence: Provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

Section 14 enacts, that "in case any party shall intend to use in evidence, on such examination or hearing in any court of equity, any original register or record (instead of such certificated extract), he shall nevertheless, within the number of days hereinbefore respectively mentioned, deliver to the clerk or clerks in court of the opposite party or parties a notice of his intention to use such original register or record in evidence, together with a copy of a certified extract of the entry or entries which he shall intend to use in evidence."

Section 15 enacts, that "in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any court of equity or in the Master's office, any extract certified as hereinbefore mentioned, he shall produce to the court or Master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine."

Section 16 enacts, that "in case any party shall intend to use in evidence in any Ecclesiastical Court, or in the High Court of Admiralty, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from the parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: Provided always, that the judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in pœnam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

Section 17 enacts, that "in all criminal cases, in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record."

All the above enactments have been extended to the registers deposited under 21 & 22 V. c. 25, by section 3 of that Act.

(*b*) 42 & 43 V. c. 8.

(*c*) Formerly under 12 & 13 V. c. 68, and now under 55 & 56 V. c. 23.

(*d*) 26 & 27 V. c. 11, s. 5.

(*e*) 17 & 18 V. c. 80, s. 58. This section was amended by the Registration of Births, Deaths, and Marriages (Scotland) Amendment Act, 1910 (10 Ed. 7. and 1 G. 5. c. 32), which provides that the Registrar-General shall cause to be made a seal of the General Registry Office, and the Registrar-General shall cause to be sealed or stamped therewith all extracts of entries given in the said office; and all extracts of entries purporting to be sealed or stamped with the seal of the said General Registry Office shall be deemed to be duly authenticated by the Registrar-General, and the provisions of the said section shall apply thereto as fully as if such authenticated extracts were signed by the Registrar-General. See *ante*, § 7.

(*f*) 19 & 20 V. c. 96, s. 2, enacts, in substance, that any certified copy of the entry of any irregular marriage in the Scottish register of marriages, shall, if signed by the registrar, be received in evidence of such marriage, and of the residence in Scotland required by the Act, in all courts in the United Kingdom and dominions thereunto belonging. This Act is amended by 6 Geo. 5. c. 7.

register of marriages in Ireland, deposited in the General Register Office, at Dublin (*g*).

§ 1603. Next come registers and books kept at the Patent Office, and patents for inventions, specifications, and all other documents in that office, which are provable by printed or written copies or extracts, purporting to be certified by the comptroller, and sealed with the office seal (*h*); the documents relating to the election of members of parliament, deposited with the Clerk of the Crown in Chancery (*i*), which, when admissible in evidence at all, may be proved by office copies issued by such clerk (*k*); the valuations of rateable property in Ireland, and all field-books and documents relating thereto, which are provable by copies or extracts purporting to be signed by the commissioner of valuations, or by his deputy (*l*), or for the purposes of any proceeding in any Civil Bill Court, by the clerk of the union in the rate-book of which the valuation appears (*m*); the valuation-lists of property in the Metropolis, which may be proved by duplicates or copies certified by the clerk of the assessment committee that approved them (*n*); the documents kept by the registrar of companies, copies or extracts from which, certified under the hand of the registrar or an assistant registrar, are receivable in evidence (*o*); the reports of inspectors appointed under the Companies (Consolidation) Act, 1908, which are provable by copies authenticated by the seal of the company whose affairs have been investigated (*p*); declarations made under the British Nationality and Status of Aliens Act, 1914, certificates of naturalization, and entries made in any register in pursuance of the Act (*q*); the register of newspaper proprietors, which is

(*g*) 7 & 8 V. c. 81, ss. 52 and 71. This last section is the same as s. 38 of 6 & 7 W. 4, c. 86, excepting only that it is confined to marriages. See, also, 26 & 27 V. c. 90.

(*h*) 7 Ed. 7, c. 29, s. 79. S. 80 of the same Act further provides, that "(1) Copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the Patent Office; (2) Certified copies of, or extracts from, any such documents and of any documents so transmitted in pursuance of any enactment repealed by this Act shall be given to any person, on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals."

(*i*) See *ante*, § 1516.

(*k*) 35 & 36 V. c. 33, Sch. 1, Part 1, r. 42.

(*l*) 23 & 24 V. c. 4, s. 9.

(*m*) 40 & 41 V. c. 56, s. 32.

(*n*) 32 & 33 V. c. 67, s. 64. See also the Local Government Act, 1888 (51 & 52 V. c. 41).

(*o*) 8 Ed. 7, c. 69, s. 243 (7).

(*p*) 8 Ed. 7, c. 69, s. 111.

(*q*) 4 & 5 G. 5, c. 17, ss. 20, 21, 22.

kept by the registrar of joint-stock companies, and copies of entries in which, certified by the registrar or his deputy, or under the official seal of the registrar, are in all proceedings, civil or criminal, sufficient *prima facie* evidence of all matters thereby appearing; the register (*r*) of licences kept in pursuance of the Licensing (Consolidation) Act, 1910, which are receivable in evidence of the matters required to be entered therein, and the entries in which are provable by copies certified to be true, and purporting to be signed by the clerk of the licensing justices (*s*).

§ 1604. Under the Merchant Shipping Act, 1894 (*t*), register books, certificates of registry, indorsements on such certificates, and declarations in respect of British ships (*u*); a copy or transcript of the register of British ships kept by the registrar-general of shipping and seamen (*v*); certificates of competency (*x*); statements of changes in his crew sent by a master of a foreign-going ship to a superintendent (*y*); releases of seamen's wages (*z*); submission to, or awards of, superintendents as to any question between a master or owner and any of his crew (*a*); duplicate agreements or lists of crew in cases where ship is lost (*b*); official log-books (*c*); certificates of execution of bonds given by master of emigrant ship (*d*); certificates of expenses incurred in respect of wrecked passenger, or forwarding a passenger (*e*); certificates of tonnage of fishing boats (*f*); decisions of superintendents of disputes between owners, skippers and seamen of fishing boats (*g*); indorsements of superintendents on indentures of apprentices, and agreements with boys (*h*); registers of certificated skippers and second hands (*i*); records of draught of water of sea-going ships (*k*); reports of proceedings of naval courts (*l*); valuations of property in respect of which salvage claims are made by valuers appointed by receiver of district where such property is (*m*); depositions previously made, when witness cannot be produced (*n*); and documents purporting to be made, issued, or written by or under the direction of the Board of Trade (*o*); are, on their production from the proper custody, admissible in evidence, and a copy of any such document or extract therefrom is also so admissible, if proved to be an examined copy or ex-

(*r*) 44 & 45 V. c. 60, s. 15. See, also, 37 & 38 V. c. 69, ss. 35, 36.
(*s*) 10 Ed. 7 and 1 G. 5, c. 24, s. 53 (3).
(*t*) 57 & 58 V. c. 60.
(*u*) S. 64 (2).
(*v*) S. 64 (3)
(*x*) S. 100.
(*y*) S. 117.
(*z*) S. 136 (3).
(*a*) S. 137 (2).
(*b*) S. 174 (3).
(*c*) S. 239 (6)
(*d*) S. 310 (2).
(*e*) S. 334 (2).
(*f*) S. 371 (3).
(*g*) S. 387 (2)
(*h*) S. 395 (4).
(*i*) S. 416.
(*k*) S. 436 (2).
(*l*) S. 484.
(*m*) S. 551.
(*n*) S. 691.
(*o*) S. 719.

tract, or if it purport to be signed and certified as a true copy or extract (*p*).

§ 1604A. All records made in regimental books in pursuance of any Act, or of the King's Regulations, or of military duty, are, by virtue of the Army Act, 1881, rendered admissible in evidence of the facts therein stated, provided they purport to be signed by the commanding officer or by the officer whose duty it is to make them; and a copy of any such record, purporting to be certified by the officer having the custody of such book, is evidence of such record (*q*). So, also, all warrants or orders made in pursuance of the Army Act, 1881, by any military authority are "evidence of the matters and things therein directed to be stated," and may be proved by copies purporting to be certified "by the officers therein alleged to be authorised by a Secretary of State or the Army Council to certify the same" (*r*). Again, the attestation paper (*s*) purporting to be signed by a soldier, or his declaration made on re-engagement in any of the regular forces, or on any enrolment in any branch of the service, is evidence of his having given the answers to questions which he is therein represented as having given; and his enlistment may be proved by a copy of his attestation paper, purporting to be certified by the officer having the custody of such document (*t*). In proceedings against a soldier on a charge of being a deserter or absentee without leave, where the soldier has surrendered himself into the custody of any portion of his Majesty's forces, a certificate purporting to have been signed by the commanding officer of that portion of the forces and stating the fact, date, and place of such surrender is evidence of the matters so stated (*u*).

§ 1605. The same mode of proof applies to the rules of certified schools, which are provable by copies purporting to be signed by the chief inspector of reformatory and industrial schools (*v*); the rules of loan societies, which may be proved either by the book in which they are entered, or by the transcript deposited with the clerk of the peace, or town clerk, or by an examined copy of such transcript, or

(*p*) S. 695. The Act also provides (s. 256 (2)) that all the documents referred to in s. 256 (1) shall be public records and documents within the meaning of the Public Record Offices Act, 1838 and 1877, and those Acts shall, where applicable, apply to those documents in all respects, as if specifically referred to therein.

(*q*) 44 & 45 V. c. 58, s. 163, sub-s. 1 (*g*) and (*h*). S. 163 of this Act applies to all proceedings under the Reserve Forces Act, 1882, 45 & 46 V. c. 48, s. 27; and the Militia Act, 1882, 45 & 46 V. c. 49, s. 44, sub-s. 2. See, also, the Territorial and Reserve Forces Act, 1907 (7 Ed. 7, c. 9), s. 10.

(*r*) *Id.*, s. 163, sub-s. 1 (*e*); 9 Ed. 7, c. 3; see also 8 G. 5, c. 6, s. 12 (1).

(*s*) *Id.*, s. 80.

(*t*) *Id.*, s. 163, sub-s. 1 (*a*).

(*u*) 2 G. 5, c. 5, s. 6.

(*v*) 8 Ed. 7, c. 67, s. 88 (5).

by a copy certified by the barrister appointed for that purpose (*x*); the rules of building societies, which may be proved by "a printed copy certified by the secretary or other officer of the society to be a true copy of its registered rules" (*y*); and the rules of friendly societies which may, as it would seem, be proved by copies purporting to be certified by the central office (*z*).

§ 1606. The memorials setting forth the firm names, and the names and places of abode of the members and public officers of banking copartnerships (*a*), which are kept at the Office of Inland Revenue (*b*), may be proved by copies certified under the hand of one of the Commissioners of Inland Revenue; the minutes of the orders given by any board of guardians or district board, respecting any complaint, claim, or application made to them, may be proved by a copy purporting to be signed by the chairman of the board, and to be sealed with their seal, and to be countersigned by their clerk (*c*); the orders made by a judge in lunacy in matters in lunacy, and the reports of the masters in lunacy, confirmed by fiat, may be proved by office copies purporting to be signed by a master, and to be sealed or stamped with the seal of his office; also, certificates in lunacy may be proved by office copies (*d*); the licences, orders, and instruments granted, made, issued, or authorised by the Commissioners in Lunacy in pursuance of the Lunacy Act may be proved by copies purporting to be sealed with the seal of the commission (*e*); all orders made by the Commissioners of Public Works in Ireland, by virtue of the Drainage Maintenance Act of 1866, are made provable by copies purporting to be sealed by the commissioners (*f*); orders and resolutions of the local authorities under the Public Health Act, 1875, may be proved by copies purporting to be signed by the chairmen of the meetings (*g*); orders or regulations of a local authority under the Diseases of Animals Act, 1894, may be proved by the production of a newspaper purporting to contain a copy of them as an advertisement, or by the production of a copy purporting to be certified as a true copy by the clerk of the local authority (*h*); licences and rules confirmed or made under the Explosives Act, 1875, may be proved by copies certified by a

(*x*) 3 & 4 V. c. 110, s. 7.
(*y*) 37 & 38 V. c. 42, s. 20.
(*z*) See 59 & 60 V. c. 25, s. 100.
(*a*) 7 G. 4, c. 46, ss. 4, 6.
(*b*) 53 & 54 V. c. 21, ss. 1 (2), 3-5.
(*c*) 7 & 8 V. c. 101, s. 69.
(*d*) The Lunacy Act, 1890 (53 V. c. 5), s. 144. See *Harvey* v. *Rex*, [1901] A. C. 601; 70 L. J. P. C. 107.
(*e*) S. 152.
(*f*) 29 & 30 V. c. 49, s. 20.
(*g*) 38 & 39 V. c. 55, Sch. 1, R. 1, sub-rule 10.
(*h*) 57 & 58 V. c. 57, s. 37.

Government inspector (*i*); an instrument purporting to be an order of a court under Part IV. of the Children Act, 1908, signed by the members of the court which made the order, or purporting to be a copy of such an order, and certified as a copy by the clerk of the court, is evidence of the order (*k*); and the orders of justices for forming a highway district, are provable by copies certified by the clerk of the peace (*l*).

§ 1607. As to inclosures, the awards and orders made or confirmed by the Board of Agriculture, and other instruments proceeding from that Board, may be proved by copies purporting to be sealed with the seal of the Board (*m*); and copies of the confirmed awards which are deposited with the clerk of the peace of the county where the lands inclosed are situate are provable by copies or extracts "signed by the clerk of the peace or his deputy, purporting the same to be a true copy" (*n*); the plans and books of reference deposited by railway companies with the clerks of the peace, may be proved by copies or extracts certified by those officers (*o*); the minutes of the proceedings of the Charity Commissioners, and all orders, certificates, and schemes made or approved by them, are provable by copies purporting to be extracted from the books of the board, and to be certified by the secretary (*p*); all leases and other instruments made under the Act for enabling incumbents of ecclesiastical benefices to demise their lands on farming leases, which are respectively entered in the proper ecclesiastical registry, may be proved by office copies certified under the hand of the registrar or his deputy (*q*); all counterparts of leases and other instruments deposited with the Ecclesiastical Commissioners for England, under the provisions of the Act enabling ecclesiastical corporations to grant leases for long terms, are provable by office copies certified under the seal of the commissioners (*r*): and all agreements and awards, apportionments, maps, or plans (*s*), confirmed by the Tithe Commissioners, who, with certain other commissioners, under the Settled Land Act, 1882 (*t*), became and were

(*i*) 38 & 39 V. c. 17, s. 60.
(*k*) 8 Ed. 7, c. 67, s. 88 (4).
(*l*) 27 & 28 V. c. 101, s. 12.
(*m*) The Board of Agriculture Act, 1889 (52 & 53 V. c. 30). The powers and duties of the land commissioners are by this Act transferred to the Board of Agriculture.
(*n*) 8 & 9 V. c. 118, s. 146. See also 3 & 4 W. 4, c. 87, ss. 2, 4.
(*o*) 8 & 9 V. c. 20, s. 10. See *post*, § 1637.
(*p*) 16 & 17 V. c. 137, s. 8. See, also, 18 & 19 V. c. 124, ss. 4 & 5.
(*q*) 5 & 6 V. c. 27, s. 14.
(*r*) 5 & 6 V. c. 108, s. 29.
(*s*) *Giffard* v. *Williams*, (1869) 38 L. J. Ch. 597.
(*t*) 46 & 47 V. c. 38, s. 46.

styled Land Commissioners, are provable by copies in accordance with the Board of Agriculture Act, 1889 (*u*).

§ 1608. Again, the order of a general meeting of any company subject to the provisions of the Companies Clauses Consolidation Act, authorising the borrowing of any money, is provable by a copy certified to be true by one of the directors or by the secretary (*v*); all entries made in the registers of common lodging-houses kept under the Public Health Act, 1875 (*x*), are provable by copies certified to be true by the person having charge of the register (*y*); the licences granted by the Inspectors of Irish Fisheries for the formation of oyster beds, are provable by copies testified under the hand of the respective clerks of the peace with whom true copies of the originals shall have been lodged (*z*); the books kept at the office of the Commissioners of the Police of the Metropolis, in which are entered the particulars of the licences granted to the drivers, conductors, and watermen of metropolitan public carriages, and all entries therein, may be proved by copies purporting to be certified by the persons having the charge of the books (*a*); and the duplicates or copies of stage-carriage licences, filed in the Office of Inland Revenue whence the licences issue, are provable by copies purporting to be certified under the hand of one of the Commissioners of Inland Revenue, or of the officer by whom the licence has been granted, or of some other person appointed and authorised by the commissioners in that behalf (*b*). Printed or written copies of extracts of and from the Register of Trade Marks, purporting to be certified by the Registrar and sealed with the seal of the Patent Office are admissible in evidence (*c*).

§ 1608A. The inconvenience caused to bankers by constantly having their clerks subpœnaed to produce the books of the firm in courts of justice was felt to be so great that, by the Bankers' Books Evidence Act, 1879 (*d*), it was in substance enacted as follows:—

(*u*) 52 & 53 V. c. 30. This Act transferred the powers and duties of the Land Commissioners to the Board of Agriculture. The tithe commutation maps are not evidence of the boundaries of lands as between two proprietors. *Wilberforce* v. *Hearfield*, (1877) 46 L. J. Ch. 584; 5 Ch. D. 709; but they may be admissible sometimes on questions of general public right: see *Smith* v. *Lister*, (1895) 54 L. J. Q. B. 154; *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188; 74 L. J. Ch. 599.

(*v*) 8 & 9 V. c. 16, s. 40.

(*x*) 38 & 39 V. c. 55.

(*y*) S. 76.

(*z*) 29 & 30 V. c. 97, s. 7; amended by 32 & 33 V. c. 92; and extended by 61 & 62 V. c. 28.

(*a*) 6 & 7 V. c. 86, s. 16. See 16 & 17 V. c. 33; and 32 & 33 V. c. 115, ss. 6, 8, 11, 15; also, as regards Dublin 16 & 17 V. c. 112, s. 12.

(*b*) 12 & 13 V. c. 1, s. 16. See 10 & 11 V. c. 42.

(*c*) 5 Ed. 7, c. 15, s. 50.

(*d*) 42 & 43 V. c. 11, repealing an earlier Act passed in 1876.

Subject to the provisions of the Act, a copy of any entry in a banker's book,—which term includes ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank (*e*), —shall, in all legal proceedings, civil or criminal, including arbitrations (*f*), and for or against any one (*g*), be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded (*h*). But such copy cannot be received unless proof be given that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and is in the custody or control of the bank, and that the entry was made in the ordinary course of business (*i*). Such proof may be given by a partner or officer of the bank, and either orally or by affidavit (*k*). The copy must also be an examined copy, and proof of that fact "shall be given by some person who has examined the copy with the original entry," and may be given either orally or by affidavit (*l*). Section 6 then goes on to enact, that "A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book," or to appear as a witness to prove the matters therein recorded, unless by order of a judge (*m*) made for special cause (*n*). Under section 7 the court (*o*) or judge is empowered (*p*), on the application of any party to a legal proceeding, to order (*q*) "that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings"; and any such order may be made with or without summoning the bank or any other party (*r*), "and shall be served on the bank three

(*e*) 42 & 43 V. c. 11, s. 9.

(*f*) S. 10.

(*g*) *Harding* v. *Williams*, (1880) 14 Ch. D. 197; 49 L. J. Ch. 661.

(*h*) S. 3.

(*i*) S. 4; *Asylum for Idiots* v. *Handysides*, (1906) 22 Times L. R. 573.

(*k*) S. 4.

(*l*) S. 5.

(*m*) This term includes the judge of a county court with respect to any action in such court: S. 10.

(*n*) The costs of such an order are "in the discretion of the court or judge." S. 8.

(*o*) This includes a magistrate before whom a criminal charge is proceeding: *R.* v. *Kinghorn*, [1908] 2 K. B. 949; 78 L. J. K. B. 33.

(*p*) As to when this power will be exercised, see *Perry* v. *Phosphor Bronze Co.*, (1884) 71 L. T. 854.

(*q*) See *Davies* v. *White*, (1884) 53 L. J. Q. B. 275, as to what affidavit will be required in support of the application for the order. Under s. 7 the court has power in a legal proceeding in England to order inspection and copies of any entries in a banker's book in either of the other divisions of the United Kingdom: *Kissam* v. *Link*, [1896] 1 Q. B. 574; 65 L. J. Q. B. 433.

(*r*) Although an order to inspect *may* be granted *ex parte*, and without evidence, in any civil proceeding, the person whose account is to be inspected should, however, generally be served with notice of the application; *Arnott* v. *Hayes*, (1887) 36 Ch. D. 731; 56 L. J. Ch. 844. Such order ought, moreover, to be limited to the time which covers the dispute (per Cotton and Bowen, L.JJ.). A person against whom such an order has been made is entitled to seal up such parts of the books which are the subject of the order as he swears to be irrelevant to the matters in issue; *Parnell* v. *Wood*, [1892] P. 137.

clear days (*s*) before the same is to be obeyed, unless the court or judge otherwise directs." This jurisdiction to order inspection is exercised in conformity with the general law as to discovery, therefore an order for the inspection of entries, which the party swears to be irrelevant, will not be made (*t*). Although the section authorises an order to inspect entries relating to an account kept in the name of a person who is not a party to the action (*u*), such an order will, in general, only be made where they are entries in an account which is in form or substance the account of one of the parties to the litigation (*v*). It only remains to observe that this statute applies to all ordinary banks, all savings banks, all post-office savings banks (*x*), and all companies carrying on the business of bankers to which the Companies (Consolidation) Act, 1908, applies, provided these last have duly furnished to the registrar of joint-stock companies the prescribed lists and summaries (*y*); and that it endeavours to facilitate the proof of "any person, persons, partnership, or company" being included within any one of these categories (*z*).

§ 1609. The Friendly Societies Act, 1896, contains a peculiar clause with respect to documentary evidence; for instead of adopting the almost stereotyped form of rendering admissible the certified or examined copies of documents, it enacts, that "Every document bearing the seal or stamp of the central office, shall be received in evidence without further proof"; and it then goes on to provide that "every document purporting to be signed by the chief or any assistant registrar, or any inspector or public auditor or valuer under this Act, shall, in the absence of any evidence to the contrary, be received in evidence without proof of the signature" (*a*). It will

(*s*) Exclusive of Sunday, Christmas Day, Good Friday, and any Bank Holiday: S. 11.

(*t*) *South Staffordshire Tramways Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669; 65 L. J. Q. B. 96.

(*u*) *Howard* v. *Beal*, (1889) 23 Q. B. D. 1; 58 L. J. Q. B. 384.

(*v*) *Pollock* v. *Garle*, [1898] 1 Ch. 1; 66 L. J. Ch. 788; and see *South Staffordshire Tramways Co.* v. *Ebbsmith*, *supra*.

(*x*) S. 9.

(*y*) 45 & 46 V. c. 72, s. 11, sub-s. 2.

(*z*) S. 9 is as follows:—"In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post-office savings bank. The fact of any such bank having duly made a return to the Commissioners of Inland Revenue, may be proved in any legal proceeding, by production of a copy of its return verified by the affidavits of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificates; the fact that any such bank is a post-office savings bank may be proved by a certificate, purporting to be under the hand of his Majesty's Postmaster-General, or one of the secretaries of the Post Office."

(*a*) 59 & 60 V. c. 25, s. 100.

be noted that this last provision would appear to be confined to original documents, and that copies or extracts,—to become admissible under the Act,—must, as it would seem, be sealed in accordance with the first paragraph of the section.

§ 1610. Besides the instances just referred to and the cases of public books and registers, the Legislature has in many cases enacted that evidence may be given by means of certificates, or of certified copies of, or extracts from, documents. It will suffice, in this place, to mention a few of the matters of most frequent occurrence which are so provable (*b*).

(*b*) Some (but not all) of the other matters as to which proof is allowed to be given in the way mentioned in the text are the following :—The Army Act, 1881 (44 & 45 V. c. 58), ss. 157, 162 (6), provides that no person subject to military law, who has been acquitted or convicted of any offence, either by a court-martial or by a competent civil court, is liable to be tried again by a court-martial in respect of the same offence; and by section 164, as amended by 3 G. 5, c. 2, the officer having the custody of the records of a civil court in which any person has been tried must, if required by the commanding officer of the accused, or by any other officer, transmit to him a certificate setting forth the offence for which the accused was tried, together with the judgment, whether of conviction or acquittal; and any such certificate is to be "sufficient evidence of the conviction and sentence or of the order of the court or of the acquittal." This section has been applied to the reserve forces by 45 & 46 V. c. 48, s. 27; and to the militia by the Militia Act, 1882 (45 & 46 V. c. 49), s. 44 (1). Under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), s. 21, certain documents may be proved by certificates. Under the Building Societies Acts, 1874 and 1877 (37 & 38 V. c. 42, s. 20; 40 & 41 V. c. 63), any certificate of incorporation or of registration, or other document relating to a building society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by all courts without proof of the signature. Under the Registration of Business Names Act, 1916 (6 & 7 G. 5, c. 58), s. 16, a certificate of registration, or a certified copy or extract, is admissible in evidence. The Cemeteries Clauses Act, 1847 (10 & 11 V. c. 65), by section 7, empowers two justices to correct any omission, misstatement, or wrong description which it shall appear to them arose by mistake, respecting any lands, or the owners, lessees, or occupiers thereof, which shall be contained in the special Act, or in the schedule thereto, or in the plans or books of reference relating to the undertaking; and the correction shall be embodied in a certificate which shall state the particulars of the error, and shall along with the other documents to which it relates, be deposited with the clerk of the peace for the county where the lands are situate; and thereupon the undertakers may take the lands or make the works in accordance with such certificate. Section 8 further provides that copies of the plans and books of reference, and of the corrections or extracts therefrom, certified by the clerk of the peace in whose custody the documents are, shall be received in all courts of justice and elsewhere as evidence of their contents. The Charitable Trustees Incorporation Act, 1872 (35 & 36 V. c. 24), ss. 1, 6, empowers the Charity Commissioners to grant certificates of incorporation to the trustees of charities established for religious, educational, literary, scientific, or public charitable purposes; and every certificate is conclusive evidence that all the preliminary requisitions of the Act have been complied with; and the date of incorporation shall be deemed to be that which is mentioned in the certificate. The Children Act, 1908 (8 Edw. 7, c. 67), s. 88, contains various provisions for the admission in evidence of certificates with regard to "certified schools." Under the Chimney Sweepers Act, 1875 (38 & 39 V. c. 70), s. 14, any entry in the registers of master sweeps, which are required by the Act to be kept by the chief officers of police, may be proved by a copy purporting to be certified as true by the chief officer; and any statement purporting to be signed by him "of the absence of such an entry in any case" is "evidence of the matters therein appearing." The

§ 1612. With the view of reducing the expense attendant upon the proof of criminal proceedings, the Legislature enacted, in section 13

Clerical Disabilities Act, 1870 (33 & 34 V. c. 91).—To render a parson's deed of relinquishment available under this Act, first the deed must be inrolled in the Inrolment Department of the Central Office (Ord. LXI. rr. 1, 9); and next, an office copy of it must be recorded by the bishop. The Act then provides (section 7), that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, inrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." Under the Colonial Stock Act, 1877, certain certificates and lists, furnishing particulars of the amount of the debt, the numbers and names of the stockholders, and other matters, and authorised to be given to any stockholder by the registrar of colonial stock, are made admissible in evidence. The Corrupt and Illegal Practices Act, 1883 (46 & 47 V. c. 51), s. 53 (3), provides that in any prosecution or action for any offence against the Act, the certificate of the returning officer that the election was duly held, and that the person named in the certificate was a candidate "shall be sufficient evidence of the facts therein stated." A similar provision is contained in 26 & 27 V. c. 29, s. 6. The Crown Lands Act, 1832 (2 & 3 W. 4, c. 1, c. 26; see also the Crown Lands Act, 1853, 16 & 17 V. c. 56), enacts, with respect to all deeds relating to the possessions of the Crown, which are inrolled in the Land Revenue Office, that a memorandum of inrolment on the deed, purporting to be signed by the keeper of the records and inrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the inrolment, but even of the due execution of the deed, and that, too, without proof of the signature attached to it. The Diseases of Animals Act, 1894 (57 & 58 V. c. 57), provides by section 48 (1) that "in any proceeding under this Act no proof shall be required of the appointment or handwriting of an inspector or other officer of the Board of Agriculture, or of the clerk or an inspector or other officer of a local authority." On an inspector reporting a cowshed, field, or other place to have been, within ten days, infected with cattle plague, he is to inform the Board of Agriculture, who shall forthwith inquire into the subject: section 5. The certificate of a veterinary inspector that an animal is or was affected by disease is by section 44 (5) conclusive evidence, in all courts of justice, of the matter certified. The Ecclesiastical Dilapidations Act, 1871 (34 & 35 V. c. 43), ss. 27, 46, 50, makes the certificate of the official surveyor of the diocese conclusive evidence of the due execution of repairs directed by him to be executed. The Elementary Education Acts, 1870 and 1873 (33 & 34 V. c. 75, s. 83; 36 & 37 V. c. 86, s. 24 (5)), contain special clauses with respect to the proof and admissibility of certificates granted either by the Education Department or by the principal teacher of a public elementary school. The Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), by section 147 (3), enacts that a written declaration by the certifying surgeon "that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person." The Foreign Marriage Act, 1892 (55 & 56 V. c. 23), provides, section 17, as follows:—"All the provisions and penalties of the Marriage Registration Acts, relating to any registrar, or register of marriages, shall extend to every marriage officer, and to the register of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted, and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts." Under the Friendly Societies Act, 1896 (59 & 60 V. c. 25), s. 11, "an acknowledgment of registry" issued by the registrar, on being satisfied that a society has complied with the statutory requirements, and specifying the designation of the society according to the classification in the Act, is conclusive evidence that the society has been duly registered, unless it is proved that the registry has been suspended or cancelled; and, under section 13 (1), the registrar shall, on being satisfied that any proposed amendment of a rule of any such society is not contrary to the provisions of the Act, issue to the society an acknowledgment of registry of the same, which shall be conclusive evidence that the same is duly registered. The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 V. c. 27), contains in sections 7, 10, provisions similar to those in sections 7, 8 of the Cemeteries Clauses Act, 1847, men-

of Lord Brougham's Evidence Act, of 1851 (*c*), that "whenever, in any proceeding whatever," (which term includes all civil as well as

tioned above, and also, in section 26, provides that the chairman of quarter sessions may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. Indemnity Certificates are sometimes granted to witnesses who make full disclosures respecting corrupt practices at Parliamentary elections, gaming, and other illegal transactions; and in the event of any ulterior proceedings against such witnesses the certificates constitute a valid defence and will be received in evidence on their mere production, provided that they be drawn up in the proper form, and that they purport to be signed by the persons who are respectively authorised to grant them. See the Acts noticed *ante*, § 1445, note; and 8 & 9 V. c. 113, s. 1, *ante*, § 7. Under the Judgment Mortgage (Ireland) Act, 1850 (13 & 14 V. c. 29), ss. 6, 7, in order to prove a judgment mortgage, first, the judgment must be proved in the usual way; next, the affidavit filed when the judgment is entered must be proved by an office, or a certified, or an examined, copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland must be proved either by an examined or a certified copy. It seems doubtful whether such last-named copy will be received in evidence unless the notice required by the Registry of Deeds (Ireland) Act, 1832, s. 32, has been duly given. See *Duncan* v. *Brady*, (1860) 12 Ir. C. L. R. 171. Under the Lands Clauses Consolidation Act, 1845 (8 & 9 V. c. 18), ss. 16, 17, the fact that the whole capital has been subscribed (until this has been done no company can put in force its compulsory powers of taking land) may be proved by a certificate under the hands of two justices, granted on the application of the promoters, and the production of such evidence as such justices think sufficient. The Markets and Fairs Clauses Act, 1847 (10 & 11 V. c. 14), contains, in sections 7, 8, clauses similar to those in sections 7, 8 of the Cemeteries Clauses Act, 1847, above noticed; it also provides in section 32 that two justices may grant certificates, which shall be conclusive evidence that the works are completed and fit for public use. The Marriage Acts (see the Marriage Act, 1836 (6 & 7 W. 4, c. 85), s. 37; the Births and Deaths Registration Act, 1837 (7 W. 4, and 1 V. c. 22), s. 5; the Marriages (Ireland) Act, 1844 (7 & 8 V. c. 81), s. 43, provide that if any action be brought against a party for having vexatiously entered a caveat, "a copy of the declaration of the Registrar-General, purporting to be sealed with the seal of the General Register Office, shall be evidence that the Registrar-General has declared such caveat to be entered on frivolous grounds, and that they ought not to obstruct the grant of the licence, or the issue of the certificate"; and the plaintiff thereupon shall recover costs and damages. The Marriage and Registration Act, 1856 (19 & 20 V. c. 119), contains, in section 24, provisions somewhat similar to those in section 11 of the Places of Worship Registration Act, 1855, below mentioned. The British Nationality and Status of Aliens Act, 1914 (4 & 5 G. 5, c. 17), ss. 20, 21, provides that certificates of naturalization, as well as all declarations authorised to be made under the Act, may be proved by the production of the original documents, or of any copies certified to be true by a Secretary of State, or by some person authorised by such secretary to give them. The Act also (section 22) provides for the admission in evidence of copies of entries of any register made in pursuance of the Act. Under the Parliamentary Costs Act, 1865 (28 & 29 V. c. 27), ss. 3, 5, the House of Lords Costs Taxation Act, 1849 (12 & 13 V. c. 78), s. 9, and the House of Commons Costs Taxation Act, 1874 (10 & 11 V. c. 69), s. 9, the Clerk of the Parliaments, or Clerk-Assistant, the Speaker, and the Taxing Officer of the Lower House, are respectively authorised to issue certificates of the amount of costs allowed on taxation in respect of private bills; and such certificates are conclusive evidence of the amount of such costs in all legal proceedings, and operate on production as warrants of attorney to confess judgment, unless the defendant has in his statement of defence denied his liability to make any payment in respect of them. The signatures to such certificates need not be proved; see 8 & 9 V. c. 113, s. 1, cited *ante*, § 7. See also *Williams* v. *Swansea Canal Navigation Co.*, (1868) L. R. 3 Ex. 158. Parliamentary Papers.—The Act to give summary protection to persons employed in the publication of Parliamentary Papers (3 & 4 V. c. 9), s. 1, provides that all proceedings, civil or criminal, against any person for the publication of papers

criminal proceedings) (*d*), "it may be necessary to prove the *trial and conviction or acquittal* of any person charged with any indictable

printed by order of Parliament shall be stayed upon the production of a certificate under the hand of the Lord Chancellor, the Lord Keeper, or the Speaker of the House of Lords for the time being, the Clerk of the Parliaments, the Speaker of the House of Commons, or the Clerk of the same House, stating that such papers were published by order of either House. The affidavit verifying such certificate required by the Act is not now necessary. See 8 & 9 V. c. 113, s. 1, cited *ante*, § 7. The Midwives Act, 1902 (2 Edw. 7, c. 17), s. 7, provides that a copy of the roll of midwives purporting to be printed by the authority of the Midwives Board, or to be signed by the secretary of the Board, shall be evidence in all courts that the women therein specified are certified under the Act, and in the case of any woman whose name does not appear in any such copy, a certificate under the hand of the secretary of the entry of the name of such woman on the roll shall be evidence that such woman is certified. The Midwives Act, 1918 (8 & 9 G. 5, c. 43), s. 3, provides that a certificate purporting to be signed by the Secretary of the Board that the name of a woman whose name appears in the roll of the midwives has been removed from the roll, and of the date of such removal shall be evidence that such woman is not certified under this Act and of the date as from which she ceased to be certified. See also the Midwives (Scotland) Act, 1915 (5 & 6 G. 5, c. 91). The Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 35, provides that the judge before whom any action for infringing a patent shall be tried may "certify that the validity of the patent came in question; and if the court or judge so certifies, then in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses, as between solicitor and client." See *Honiball* v. *Bloomer*, (1854) 10 Ex. 538; 24 L. J. Ex. 11; 102 R. R. 697. The same statute provides, in section 77, that any certificate purporting to be under the hand of the Comptroller as to any entry, matter, or thing, which he is authorised by that Act, or any general rules made thereunder, to make or do, shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone. The Comptroller is further directed, in section 51, to "grant a certificate of registration to the proprietor of the design when registered." The Places of Worship Regulation Act, 1855 (18 & 19 V. c. 81), s. 11, provides that a certificate of the Registrar-General, sealed or stamped with the seal of the General Register Office, that at the time or times therein stated, any place certified to him as a place of meeting for religious worship was duly certified and duly recorded as requqired by the Act, and that at the date of such sealed or stamped certificate the record of such certification remained uncancelled, shall be received in all judicial proceedings as evidence of the several facts therein mentioned without further or other proof. The Poor Law Amendment Acts, 1844 and 1848 (7 & 8 V. c. 101; 11 & 12 V. c. 110). Section 69 of the Act of 1844 authorises boards of guardians and district boards to make certificates of the chargeability of any paupers; and if these documents substantially follow the form given in Schedule C of the Act, and purport to be signed by the chairman of the respective boards, to be sealed with their seals, and to be countersigned by their clerk, they are *prima facie* evidence of the truth of all statements contained therein; and no other proof of chargeability is required for the purpose of making any order of removal or other order, provided such order bear date within twenty-one days after the day of the date of any such certificate. In order to clear up any doubt respecting the admissibility of these certificates, the Act of 1848 further enacts, in section 11, that in any court, and before any justice or justices, and for all purposes, a certificate in the form prescribed in Schedule C of the Act of 1844, and purporting to have been executed in the manner prescribed by that Act, shall be received within twenty-one days from the date thereof as sufficient evidence of the chargeability of the person named therein, unless the contrary be otherwise shown. The Railway Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), authorises the grant of certificates enabling railway companies to modify the construction of roads, bridges, and other engineering works. These certificates, now, under 14 & 15 V. c. 64, s. 3, issue from the Board of Trade, and are admissible in evidence if they purport to be signed by one of the secretaries or

offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be

assistant secretaries of the board, or by any other officer appointed by the board to sign documents relating to railways. As to the proof of certificates granted before the last-mentioned Act, see 8 & 9 V. c. 20, ss. 66, 67. The Railway Companies Powers Act, 1864 (27 & 28 V. c. 120), ss. 18, 30; the Railway Construction Facilities Act, 1864 (27 & 28 V. c. 121), ss. 20, 60. Certificates granted by the Board of Trade under these Acts must be judicially noticed, and are provable by copies published in the London, Edinburgh, or Dublin Gazette. See also 33 & 34 V. c. 19. The Registry of Deeds (Ireland) Act, 1832 (2 & 3 W. 4, c. 87), enacts (section 32) that an office copy of any memorial registered in the register office shall, upon being proved in like manner as an office copy of any other record, be receivable in all judicial proceedings as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original. But notice in writing of the production of such office copy must be given to the adverse party, who may by a counter-notice require production of the original, the costs of producing which will, however, have to be paid by either party as the court, or its taxing officer, may determine. The Act for the better Regulation of the Office of the Registrar of Judgments in Ireland (13 & 14 V. c. 74), s. 10, requires the registrar to grant a certificate under his hand of the registry or re-entry of any judgment, or revival, decree, rule, order, Crown bond, recognisance, or *lis pendens*, or of any satisfaction, vacate, or quietus in his office, and this certificate is made evidence of any registry on re-entry. An assignment of a judgment in Ireland may be proved by an examined copy of the inrolment of the memorial (*Fitzgerald* v. *Fitzgerald*, (1849) 8 C. B. 492; *Hobhouse* v. *Hamilton*, (1803) 1 Sch. & Lef. 207; 2 Sch. & Lef. 28; 9 G. 2, c. 5 (Ir.), amended by 51 V. c. 3; 35 G. 2, c. 14 (Ir.); 12 G. 3, c. 19 (Ir.)), and a certified copy of such inrolment would probably, also, be admissible (see *ante*, § 1455). The Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 53), s. 21, renders certificates given by analysts under the Act admissible in evidence if they purport to be signed by the persons giving them, and they are "sufficient evidence" of the facts therein stated unless the defendant shall require that the analyst shall be called as a witness. Under the Sale of Food and Drugs Act, 1899 (62 & 63 V. c. 51), by section 1 (5), upon a prosecution under the section, the certificate of the principal chemist of the Government laboratories is "sufficient evidence" of the facts therein stated, unless the prosecutor requires the analyst to be called as a witness. By section 19 (2) and section 20 (2) copies of any analyst's certificate proposed to be used must be sent to the other side before the hearing. The certificate of the analyst is not conclusive; see *Hewitt* v. *Taylor*, [1896] 1 Q. B. 287; 65 L. J. M. C. 68. As to when the analyst's certificates are admissible under the Acts, see *Tyler* v. *Kingham*, [1900] 2 Q. B. 413; 69 L. J. Q. B. 630. See also the Milk and Dairies (Consolidation) Act, 1915 (5 & 6 G. 5, c. 66), s. 8, and the Third Schedule (4). The Towns Improvement Clauses Act, 1847 (10 & 11 V. c. 34), s. 20, contains similar provisions to those in section 7 of the Cemeteries Clauses Act, 1847. The Trade Marks Act, 1905 (5 Edw. 7, c. 15), by section 51, provides that a certificate purporting to be under the hand of the Registrar as to any entry, matter, or thing which he is authorised by the Act to make or do shall be *prima facie* evidence thereof; and by section 52 all documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by the secretary, or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence and shall be deemed to be such orders without further proof, unless the contrary is shown; sub-section 2 of the same section renders a certificate signed by the President of the Board of Trade that any order made or act done is the order or act of the Board conclusive evidence of the fact. The Trades Union Act, 1871 (34 & 35 V. c. 31), s. 13 (5), empowers registrars to issue certificates of registry of trade unions, and such certificates are "conclusive evidence that the regulations of the Act with respect to registry have been complied with." *Title.*—Certificates as to title may be given under either of the following Acts:—Under the Declaration of Title Act, 1862 (25 & 26 V. c. 67; and see also 28 & 29 V. c. 88), the Chancery Division may (section 22), after making a declaration of title in favour of any landowner, grant him

sufficient (*e*) that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquital, as the case may be, omitting the formal parts thereof" (*f*).

§ 1613. As the above general provision was not considered sufficiently comprehensive, another attempt to meet the difficulty was made by Parliament in 1871, and will be found embodied in the 18th section of the Prevention of Crimes Act of that year (*g*). This section deals only with the proof of convictions. The enactment is as follows:—"A previous conviction may be proved in any legal pro-

a certificate under seal setting forth the title so declared, and further stating that the time for appealing has expired, which certificate will be conclusive evidence of the facts therein stated. Under the Land Transfer Act, 1862 (25 & 26 V. c. 53), which first established a registry of title to landed estates, the registrar was directed (see sections 70, 71) to, upon request, deliver to every registered proprietor a certificate, called a "land certificate," under the seal of the office, and signed by the registrar, and containing (section 68) "all such particulars as are material or useful for the purpose of manifesting the exact nature of the owner's estate or interest," which certificate was made evidence of the several matters contained therein; and, under particular circumstances, such certificates might be a "special land certificate," in which latter case it was made "conclusive evidence of the title of the registered proprietor to the land as appearing by the record of title. Under the Land Transfer Act, 1875 (38 & 39 V. c. 87), certificates of title, whether absolute, qualified, or possessory, are made "*prima facie* evidence of the several matters therein contained," and office copies of registered leases are made (section 80) "evidence of the contents of the lease." Since the date of the commencement of this Act, registrations under the Act of 1862 are no longer made (section 125). The Waterworks Clauses Act, 1847 (10 & 11 V. c. 17), contains in sections 7 and 10 provisions similar to those above stated to be contained in sections 7 and 8 of the Cemeteries Clauses Act, 1847. In arbitrations under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), the Act provides (section 8) for certificates and reports to be given by medical practitioners, appointed for the purposes of the Act. The Weights and Measures Act, 1878 (41 & 42 V. c. 49; see *ante*, § 144A), requires an account to be kept by the Board of Trade of all local standards verified or re-verified of weights and measures; and by section 37 every indenture of verification or indorsement of re-verification, "if purporting to be signed by an officer of the Board, shall be evidence of the verification or re-verification of the weights and measures therein referred to." When a local standard has been compared, as it may be, by a local authority, the justice in whose presence the comparison is made must sign an indorsement on the indenture of verification of that standard, which indorsement must be recorded by the Board of Trade. It will then become "evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the board, shall be evidence of the same having been so recorded" (section 41). The Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), s. 16, and the Registration of Business Names Act (6 & 7 G. 5, c. 58), s. 16, also provide for the admissibility in evidence of certificates of registration, or duly certified copies or extracts.

(*c*) 14 & 15 V. c. 99.

(*d*) *Richardson* v. *Willis* (1872) L. R. 8 Ex. 69; 42 L. J. Ex. 15.

(*e*) See *ante*, § 1573, *ad fin.*

(*f*) See 28 & 29 V. c. 18, s. 6, cited *ante*, § 1437, which regulates the proof of certificates of conviction, when produced for the purpose of discrediting witnesses.

(*g*) 34 & 35 V. c. 112.

ceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity (*h*) of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court (*i*) by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorised by this section shall be in addition to, and not in exclusion of, any other authorised mode of proving such conviction" (*k*). The Criminal Justice Administration Act, 1914, provides that in the case of a summary conviction "the record or extract" by which the conviction may be proved under the above section may consist of a copy of the minute or memorandum entered in the register required to be kept under section 22 of the Summary Jurisdiction Act, 1879, purporting to be signed by the clerk of the court by whom the register is kept (*l*). A conviction cannot be proved orally by a witness who deposes that he was present in court when the individual was convicted, for a conviction is matter of record (*m*).

(*h*) See *R.* v. *Levy*, (1858) 8 Cox C. C. 73. Photography affords an easy mode of establishing this identity. See *Beamish* v. *Beamish*, (1876) I. R. 10 Eq. 413; *R.* v. *Tolson*, (1864) 4 F. & F. 103. In matrimonial cases, however, except under very exceptional circumstances, the court will not act upon identification by a photograph only: *Frith* v. *Frith*, [1896] P. 74; 65 L. J. P. 53; *Hills* v. *Hills*, [1915] 31 Times R. 541.

(*i*) See *R.* v. *Parsons*, (1866) L. R. 1 C. C. R. 24; 35 L. J. M. C. 167.

(*k*) The principal Acts here alluded to are 7 & 8 G. 4. c. 28, s. 11; 24 & 25 V. c. 96, s. 116; 24 & 25 V. c. 99, s. 37; and 5 G. 4. c. 84, s. 24. See, also, 34 & 35 V. c. 112, ss. 9, 20; and *London School Board* v. *Harvey*, 1879) 4 Q. B. D. 451; 48 L. J. M. C. 131, cited *ante*, § 1572.

(*l*) 4 & 5 G. 5. c. 58, s. 28.

(*m*) *Mash* v. *Darley*, [1914] 3 K. B. 1226; 83 L. J. K. B. 1740.

§ 1615. Justices in petty sessions are now empowered by the Summary Jurisdiction Act, 1879, to deal summarily with many indictable offences, provided the persons accused consent to such a mode of trial (*n*); and if, in any such case, the court think fit to dismiss the information, "they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence" (*o*). The Summary Jurisdiction Act, 1848, contains a similar provision for granting (*p*) certificates of dismissal; but here, as in all cases of this nature, it must be remembered that these certificates merely constitute a convenient mode of proving dismissals, and that the party acquitted may still establish the fact of his discharge by any other species of legal evidence (*q*).

§ 1616. Under the Act of 24 & 25 V. c. 100, ss. 42 and 43, two justices are empowered to hear cases of *common assault or battery;* and also cases of aggravated assaults on boys not exceeding fourteen years of age, and on females; and if upon the hearing of any such case they "shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a *certificate under their hands* stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred" (*r*). Section 45 then provides that the person obtaining such certificate shall be released from all proceedings, civil (*s*) or criminal (*t*), for the same cause. It seems that a certificate under this Act should specify the ground of dismissal (*u*), and should be given within a reasonable time after the hearing (*v*), if not before the justices separate (*x*); and it has also

(*n*) 42 & 43 V. c. 49, ss. 10-14.

(*o*) Section 27, sub-section 4.

(*p*) 11 & 12 V. c. 43, s. 14.

(*q*) *R.* v. *Hutchins*, (1880) 5 Q. B. D. 353; 49 L. J. M. C. 64.

(*r*) 24 & 25 V. c. 100, s. 44.

(*s*) See *Tunnicliffe* v. *Tedd*, (1848) 5 C. B. 553; 17 L. J. M. C. 67. There the complainant, after summons, declined to proceed, saying he meant to bring an action, and the justices dismissed the complaint, stating in the certificate that they did so as the complainant offered no evidence. The court held that the certificate was a bar to the action. See, also, *Vaughton* v. *Bradshaw*, (1860) 9 C. B. (N.S.) 103; 30 L. J. C. P. 93; 127 R. R. 602. A joint tort-feasor is not released: *Dyer* v. *Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448.

(*t*) See *post*, § 1710.

(*u*) *Skuse* v. *Davis* (1839) 10 A. & E. 635; 8 L. J. M. C. 75; *Holden* v. *King*, (1876) 46 L. J. Ex. 75.

(*v*) See *Hancock* v. *Somes*, (1859) 8 Cox C. C. 172; 28 L. J. M. C. 196; *Coster* v. *Hetherington*, (1859) 8 Cox C. C. 175; 28 L. J. M. C. 198; *Christie* v. *Richardson*, (1842) 10 M. & W. 688; 12 L. J. Ex. 86.

(*x*) Compare *R.* v. *Robinson*, (1840) 12 A. & E. 672; 10 L. J. M. C. 9, with *Thompson* v. *Gibson* (1841) 8 M. & W. 285, 286.

been held that, in order to take advantage of the certificate, the defendant must plead it specially (*y*).

§ 1621. The usual (*z*) mode of proving the fact of a marriage is by putting in a certificate certified to be an extract from such a register as is itself legal evidence of that fact (*a*). The mode of proving the fact of a marriage by a certified extract from such a register has already been considered (*b*).

§ 1622. Under the Act of 1855 for registering places of worship of nonconformists, the Registrar-General is directed, " with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncancelled," to " give to any person demanding the same, a certificate, sealed or stamped with the seal of the General Register Office, that, at the time or respective times in such certificate in that behalf stated, the place therein described was duly certified and duly recorded as required by this Act, and that, at the date of such sealed or stamped certificate, the record of such certification remained uncancelled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned, without any further or other proof of the same " (*c*). The Act, too, of 19 & 20 V. c. 119, contains, in section 24, somewhat similar provisions (*d*).

§ 1623 The proof of a foreign marriage which took place some years ago is often a matter of considerable difficulty, and can, indeed,

(*y*) *Harding* v. *King*, (1834) 6 C. & P. 427. See, also, *Skuse* v. *Davis*, *supra*, and *R.* v. *Westley*, 1868) 11 Cox C. C. 139.

(*z*) Of course, a certificate, though the usual, is not the only mode of proof in which a marriage can be established; for instance, it can be shown by " reputation," as to which see *ante*, § 172 and § 578.

(*a*) As to such registers, see *ante*, § 1591.

(*b*) § 1600.

(*c*) 18 & 19 V. c. 81, s. 11.

(*d*) The words are as follows: " The Registrar-General, on payment to him of the several fees hereinafter mentioned, shall allow searches to be made in the returns so made to him as aforesaid, and shall give to any person demanding the same a certified copy thereof, or extract therefrom, with respect to any place of meeting for religious worship contained therein; and every such certified copy or extract shall be sealed or stamped with the seal of the General Register Office, and when so sealed or stamped as aforesaid, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the place of meeting therein mentioned or described having been at the time in that behalf therein stated duly certified and registered or recorded as by law required, without any further or other proof of the same; and the Registrar-General shall be entitled to demand and receive for every search in the said returns extending over a period of not more than ten years, the sum of one shilling, and for every additional period of ten years the sum of sixpence, and the further sum of two shillings and sixpence for every single certified copy or extract." See, also, the Marriage Act, 1898 (61 & 62 V. c. 58), which dispenses with the necessity of the presence of the Registrar at marriages in registered places of worship.

often be only proved by reputation. Foreign registers are comparatively seldom admissible in evidence, and when they are not, certified extracts from them are, of course, equally inadmissible; and the few cases in which such foreign registers are admissible have already been mentioned (*e*). From the year 1892 the law as to foreign marriages has, however, been consolidated in the Foreign Marriage Act, 1892 (*f*). Section 16 provides that "any book, notice, or document," which is directed by the Act to be kept or preserved by a marriage officer under the Act, "shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer." The same section also directs that "a certificate of a Secretary of State as to any house, office, chapel, or other place being or being part of the official house of a British ambassador or consul shall be conclusive."

§ 1624. The Merchant Shipping Act, 1894, renders certain documents purporting to be issuued by the Board of Trade under the Act admissible in evidence. These provisions have already been set out (*g*). By the same statute, every certificate of registry of any British ship purporting to be signed by the Registrar or other proper officer, is receivable in evidence as *prima facie* proof of all the matters either contained in or indorsed on it, provided they purport to be authenticated by the signature of a registrar (*h*). So, all certificates, whether of competency or of service, granted to the masters or mates of British ships, or to the engineers of British steam-vessels (*i*), are provable not only by the production of the originals as issued by the Board of Trade but also *prima facie* by copies, purporting to be certified by the Registrar-General of Seamen, or his assistant, or by such other person as the Board of Trade appoints for that purpose (*k*).

§ 1631. Every *certificate of incorporation*, under the Companies (Consolidation) Act, 1908 (*l*), must set forth under the hand of the registrar, or, in his absence, under the hand of such person as the Board of Trade shall for the time being authorise (*m*), and in either event, as it would seem, under the seal of the registrar's office (*n*), that the company is incorporated, and in the case of a limited company, that the company is limited (*o*); and it will then, without proof

(*e*) See *ante*, § 1593.
(*f*) 55 & 56 V. c. 23.
(*g*) 57 & 58 V. c. 60, s. 719; *ante*, § 1604.
(*h*) Section 64 (2), cited *ante*, to note to § 1600. See *post*, § 1778. As to certificates of desertion, see section 229.
(*i*) Sections 10, 92, 93, 96, 99, 101, 103, 104, 272 (4) (*b*), and 471.
(*k*) Sections 100, 101, 103, and 104.
(*l*) 8 Ed. 7. c. 69.
(*m*) Section 243 (8).
(*n*) Section 243 (5).
(*o*) Section 16 (1).

of the seal, or of the signature, or of the official character of the person signing it (*p*), be "conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the association is a company authorised to be registered and duly registered under this Act" (*q*). Where the certificate purports to have been signed by a person whom the Board of Trade has authorised to act for the registrar, the court, on its being tendered in evidence, will presume that the registrar himself was absent when it was signed, and it is not necessary that that fact should either be stated on the face of the document, or be proved *aliundè* (*r*). The certificate will be equally admissible in evidence to whomsoever it may have been given, and the registrar, on payment of a sum not exceeding 5s., is bound to issue one to any person who may apply for it (*s*). Moreover, any copy "certificate of the incorporation of any company given by the registrar, or by any assistant registrar for the time being, shall be received in evidence as if it were the original certificate" (*t*). A certificate of the registrar of the order and minutes authorising the reduction of the capital of a company is conclusive evidence that all the requirements of the Act with respect to the reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute (*u*), and this is so even if the company had no power to reduce its capital (*v*). A certificate by the registrar of the registration of any mortgage or charge created by a company is conclusive evidence that the requirements as to registration have been complied with (*x*). Every certificate of the proprietorship of shares or stock in any company registered under the Act must be under the common seal of the company, and must specify the shares or stock held by any member; and it will then be admitted as *prima facie* evidence (*y*) of the title of the member to the shares or stock therein specified (*z*).

§ 1632. Very similar provisions are contained in the Companies Clauses Consolidation Act as to the certificates of the proprietorship of shares in undertakings subject to that Act, and it is only necessary that

(*p*) 8 & 9 V. c. 113, s. 1, cited *ante*, § 7.

(*q*) Section 17 (1); *In re Barned's Banking Co., Peel's Case*, (1867) L. R. 2 Ch. 674, 681; 36 L. J. Ch. 757; *Oakes* v. *Turquand*, (1867) L. R. 2 H. L. 325, 354, 369.

(*r*) *Baker* v. *Cave*, 1857) 1 H. & N. 674; 26 L. J. Ex. 190; 108 R. R. 779.

(*s*) 8 Ed. 7. c. 69, s. 243 (6).

(*t*) Section 243 (7).

(*u*) Section 51 (4).

(*v*) *Ladies' Dress Association, Lim.* v. *Pulbrook*, [1900] 2 Q. B. 705; 69 L. J. Q. B. 705.

(*x*) Section 93 (5).

(*y*) See *Shropshire Union Railway and Canal Co.* v. *R.*, (1875) L. R. 7 H. L. 496; 45 L. J. Ch. 31. See, also, *Re British Farmers Pure Linseed Cake Co.*, (1878) 7 Ch. D. 533; 47 L. J. Ch. 415.

(*z*) Section 23.

these last certificates should be sealed with the seal of the company, and should specify the share to which the holder is entitled (*a*). The same statute provides, that, where by the Special Act a company shall be restricted from borrowing money on mortgage or bond until a definite portion of their capital has been subscribed or paid up, any justice, upon production to him of the books of the company, and of such other evidence as he shall think sufficient, may grant a certificate that such capital has been subscribed or paid up, and this certificate will be sufficient evidence of the fact stated therein (*b*). So, under the Lands Clauses Consolidation Act, no company can put in force their compulsory powers of taking land, until the whole capital has been subscribed; but their compliance with this requisite may be proved by a certificate under the hands of two justices, who are authorised to grant it on the application of the promoters, and the production of such evidence as they think sufficient (*c*).

§ 1638. The registration of medical practitioners under the Medical Act of 1858 may be proved by a copy of the "Medical Register" for the time being, purporting to be printed and published by or at the instance of the Registrar of the General Council of Medical Education and Registration of the United Kingdom, under the direction of such council, or, "in the case of any person whose name does not appear in such copy," by "a certified copy under the hand of the Registrar of the General Council, or of any branch council, of the entry of the name of such person on the general or local register" (*d*). The regis-

(*a*) 8 & 9 V. c. 16, s. 11, enacts, that "on demand of the holder of any share, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled, and the same may be according to the form in the Schedule A. to this Act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed, then a sum not exceeding two shillings and sixpence."

Section 12 enacts, that "the said certificate shall be admitted in all courts as *prima facie* evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless, the want of such certificate shall not prevent the holder of any share from disposing thereof."

SCHEDULE A.

Form of Certificate of Share.

"Number ——. The —— Company.

"This is to certify that A. B., of ——, is the proprietor of the share number ——, of 'The —— Company,' subject to the regulations of the said company. Given under the common seal of the said company, the —— day of ——, in the year of our Lord ——."

(*b*) 8 & 9 V., c. 16, s. 40.

(*c*) 8 & 9 V., c. 18, ss. 16, 17; *Ystalyfera Iron Co.* v. *Neath & Brecon Railway*, (1873) 43 L. J. Ch. 476; L. R. 17 Eq. 142.

(*d*) 21 & 22 V. c. 90, s. 27. This section further enacts, that "the absence of the name of any person from the printed copy of the medical register shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of this Act."

tration of dentists is provable, under the Dentists Act, 1878 (*e*), in a similar manner. Again, the registration of "pharmaceutical chemists and of chemists and druggists" is provable by printed copies of the registers purporting to be published by the registrar appointed under the Pharmacy Acts of 1852 and 1868, and countersigned by the president or two members of the Council of the Pharmaceutical Society (*f*). And here also "the absence of the name of any person from such printed register" is, in most cases (*g*), evidence, till the contrary is made to appear, that such person is not duly registered (*h*). Similar provisions with respect to the proof and admissibility of the printed copies of the register of Veterinary Surgeons are contained in the Veterinary Surgeons Act, 1881 (*i*).

§ 1638A. Under the Army Act, 1881, "an army list or gazette purporting to be published by authority, and either to be printed by a Government printer, or to be issued, if in the United Kingdom, by His Majesty's Stationery Office, and if in India, by some officer under the Governor-General of India, shall be evidence of the status and rank of the officers therein mentioned, and of any appointment held by such officers, and of the corps, or battalion, or arm, or branch, of the service to which such officers belong" (*k*). The Naval Discipline Act, 1915, provides that "a navy list or gazette purporting to be published by authority and either to be printed by a Government printer or to be issued by His Majesty's Stationery Office, shall be evidence of the status and rank of the officers therein mentioned and of any appointment held by such officers until the contrary is proved" (*l*).

§ 1639. The certificates authorising solicitors to practise must now follow the form given by the Solicitors Act, 1877 (*m*), and must be signed by the secretary of the Law Society. The annual stamp duties must also be denoted thereon, and the date of the payment of such duties must be certified by the proper officer of the Inland Revenue Office, "by writing under his hand, or by other sufficient means." They will then "be deemed the proper stamped certificates required by law to be taken out" by solicitors (*n*); and will, it is presumed, be

(*e*) 41 & 42 V. c. 33, s. 29. See, also, s. 11.

(*f*) 15 & 16 V. c. 56, s. 7; 31 & 32 V. c. 121, s. 13. The same law prevails in Ireland. See 38 & 39 V. c. 57, s. 27.

(*g*) But see 32 & 33 V. c. 117, s. 1.

(*h*) 31 & 32 V. c. 121, s. 13. See, also, 38 & 39 V. c. 57, s. 27.

(*i*) 44 & 45 V. c. 62, s. 3, sub-s. 2, and s. 9. As to the roll of midwives, see § 1602, note.

(*k*) 44 & 45 V. c. 58, s. 163, sub-s. (*d*), as amended by 6 Geo. 5 c. 5, s. 4.

(*l*) 5 Geo. 5. c. 30, s. 9. See, also, the Army (Annual) Act, 1918 (8 Geo. 5. c. 6), s. 12.

(*m*) 40 & 41 V. c. 25, s. 16, Sch. I.; Form A.

(*n*) 23 & 24 V. c. 127, s. 18.

admissible in evidence without further proof (*o*). The Law List, which purports to be published by the authority of the Commissioners of Inland Revenue, is also made, by the Act of 23 & 24 V. c. 127, *prima facie* evidence in all courts, and before all justices and others, that the persons named therein as solicitors, or conveyancers, are duly certificated; and the absence of the name of any person from such list is evidence, until the contrary be made to appear (*p*), that such person is not qualified to practise for the current year (*q*). An extract from the roll of solicitors kept by the registrar (*r*), certified under the hand of the secretary of the Incorporated Law Society, is also evidence of the facts appearing in such extract (*s*).

§ 1640. Under the Factory and Workshop Act, 1901 (*t*), a child or young person under sixteen may not be employed in a factory subject to the Act for more than seven, or, if the certifying surgeon of the district reside more than three miles from the factory, for more than thirteen days, unless the proprietor of the factory has obtained a certificate from the "certifying surgeon for the district"; similar certificates *may* also be obtained by occupiers of workshops with respect to children and young persons employed therein (*u*). Such a certificate will probably be regarded as *prima facie* evidence of the age of the persons named therein, and of the fitness of such child or young person for such employment. Certificates of fitness given under this Act are probably receivable in evidence without proof, provided they purport to be duly signed by the person granting them (*v*). Whether this be so or not, it is expressly provided that a written declaration by the certifying surgeon "that he has personally examined a person employed in a factory or workshop in his district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person" (*x*).

§ 1645. In several cases where certain facts may by statute be proved by means of certificates, it is provided that such certificates shall be "sufficient evidence" of the facts certified to. Some doubt exists as to the meaning of these words, and the Court of Appeal has in two cases (*y*) declined to decide, as being unnecessary to their actual

(*o*) See, also, the Solicitors (Ireland) Act, 1898 (61 & 62 V. c. 17).
(*p*) *R.* v. *Wenham*, (1866) 10 Cox C. C. 222.
(*q*) 23 & 24 V. c. 127, s. 22.
(*r*) See 36 & 37 V. c. 66, s. 87; 38 & 39 V. c. 77, s. 14; 40 & 41 V. c. 57, s. 78.
(*s*) 23 & 24 V. c. 127, s. 22.
(*t*) 1 Ed. 7. c. 22, ss. 63, 64. (*u*) Section 65.
(*v*) See 21 & 22 V. c. 90, s. 37, which enacts that no medical or surgical certificate "shall be valid, unless the person signing the same be registered under this Act."
(*x*) 1 Ed. 7. c. 22, s. 147 (3).
(*y*) *Board of Trade* v. *Sailing Ship* "*Glenpark*," [1904] 1 K. B. 682; 73 L. J. K. B. 315; *Garbutt* v. *Durham Joint Committee*, [1904] 2 K. B. 514; 73 L. J. K. B. 789; reversed, [1906] A. C. 291; 75 L. J. K. B. 459.

decision, whether or no these words mean that the certificate is to be considered as conclusive. In the House of Lords, Lord Loreburn has expressed the opinion that such a certificate is not conclusive: "it was sufficient evidence—that is to say, the Court might act upon it if they thought fit" (*z*). It has been assumed in more than one case that a certificate under section 21 of the Sale of Food and Drugs Act, 1875, is *prima facie* evidence only (*a*). On the other hand, it has been held at Nisi Prius that a certificate under section 193 (3) (*b*) of the Merchant Shipping Act, 1894, is conclusive (*c*). Probably the true construction is that the certificate is conclusive if it stands alone, but may be contradicted by other evidence.

§ 1645A. *Enrolment* is, it will be recollected (*d*), *necessary* to perfect certain transactions, while it is *permissible* with regard to others (*e*). The principal transactions of this character appear to be about twelve in number, and are as follows, *viz.*: (i.) Conveyances and Leases of Crown Lands, including lands of the Crown in the Duchy of Lancaster (*f*), and those of the Heir-Apparent, as Duke of Cornwall (*g*); (ii.) Bargains and Sales of Freeholds within 27 H. 8, c. 16 (*h*); (iii.) Conveyance in Mortmain or under the Charitable Trusts Act, 1855 (*i*); (iv.) Disentailing Deeds (*k*); (v.) Annuity Deeds; (vi.) Judgments against land in England or Ireland (*l*); (vii) Deeds as to lands in Yorkshire (*m*); (viii.) Deeds as to lands in Middlesex (*n*); (ix.) Title to land under the Land Transfer Acts, 1875 and 1897 (*o*); (x.) Deeds executed under the Clerical Disabilities Removal Act, 1870, relinquishing Holy Orders (*p*); (xi.) Articles of Clerkship (*q*); and (xii.) Bills of Sale (*r*) and Warrants of Attorney and Cognovit (*s*).

§ 1646. Enrolments may in most cases—probably in all—be proved where it is necessary to do so, by the production of office copies; and, as will be seen below, by several Acts of Parliament, such copies are expressly made evidence not only of the enrolment itself, but of the contents of the instruments enrolled. Where deeds, memorials, or

(*z*) *Garbutt* v. *Durham Joint Committee*, [1906] A. C., at p. 294.
(*a*) *Harrison* v. *Richards*, (1881) 45 J. P. 552; *R.* v. *Hampshire Justices*, (1895) 64 L. J. M. C. 158.
(*b*) This section is now repealed, and replaced by 6 Ed. 7. c. 48, s. 35.
(*c*) *Board of Trade* v. *Sailing Ship* "*Glenpark*," [1903] 2 K. B. 324; 72 L. J. K. B. 697, per Bigham, J.
(*d*) See *ante*, § 1119, as to what documents generally *require*, and what *permit*, of enrolment.
(*e*) *Ante*, § 1127.
(*f*) Ante, § 1121.
(*g*) *Id.*
(*h*) *Ante*, § 1120.
(*i*) *Ante*, § 1119 and § 1127.
(*k*) *Ante*, § 1122.
(*l*) *Infra*, § 1652.
(*m*) *Ante*, § 1127.
(*n*) *Id.*
(*o*) *Ante*, § 1126A.
(*p*) *Ante*, § 1119.
(*q*) *Ante*, § 1126.
(*r*) *Ante*, § 1120.
(*s*) *Ante*, § 1116.

other instruments are required by statute to be enrolled or registered, the mode of proving the enrolment or registration will depend in great measure on the language employed in the particular Act; but, perhaps, thus much may be laid down as a general rule, that where, in pursuance of the uniform practice of the office of enrolment or registration, the officer, at the time of making the proper entry in his books, returns to the party the original instrument, with a certificate or memorandum of enrolment or registration indorsed thereon, such certificate or memorandum will be evidence both of the fact and date of enrolment or registration, without proving the signature or official character of the person signing it (*t*). Indeed, the same doctrine has been recognised and even extended by the Legislature with respect to all documents enrolled either in the *Petty Bag Office*, or in what is now called the *Enrolment Department of the Central Office* (*u*).

§ 1648. With respect to all deeds relating to the possessions of the Crown, which are enrolled in the *Land Revenue Office*, it is now enacted by statute, that a memorandum of enrolment on the deed, purporting to be signed by the keeper of the records and enrolments, or his deputy or assistant, shall be receivable as sufficient evidence, not only of the enrolment but even of the due execution of the deed, and that, too, without proof of the signature attached to it (*v*).

§ 1648A. Under the Bills of Sale Acts, 1878, 1882 (*x*), the certificate of registration of a bill of sale in the Bills of Sale Department of the Central Office (*y*), even though it state that the affidavit of execution has been duly filed as required by those statutes, is not sufficient evidence of the bill of sale, but an authenticated or office copy of the document registered must, in strict law, be actually produced (*z*).

(*t*) *Doe* v. *Lloyd*, (1840) 1 Man. & G. 684, 685; 10 L. J. C. P. 128; 56 R. R. 508. *Kinnersley* v. *Orpe*, (1779) 1 Doug. 58; *Compton* v. *Chandless*, (1801) 4 Esp. 1.

(*u*) Ord. LXI., r. 1. See 12 & 13 V. c. 109, ss. 12, 18 (now repealed).

(*v*) 2 & 3 W. 4. c. 1, s. 26, enacts, that "where any deed or certificate, receipt, or other instrument, which shall appear to have been made, given, or executed under the authority of this Act, or of any Act heretofore passed relating to the possessions of land revenues of the Crown, shall have written thereon a memorandum of its having been enrolled in the said office of records and enrolments, and such memorandum shall purport to be signed by the Keeper of the Records and Enrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed, certificate, receipt, or other instrument, having been duly made, granted, given, or executed by the party or parties by whom the same shall purport to have been signed or executed, and of its having been duly enrolled as stated by such memorandum, and of the provisions of the Act, under which the same shall appear to have been made, granted, given, or executed, having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto." See 16 & 17 V. c. 56, s. 6.

(*x*) 41 & 42 V. c. 31, s. 10; 45 & 46 V. c. 43, s. 8.

(*y*) Ord. LXI., r. 1.

(*z*) See *Emmott* v. *Marchant*, 1878) 3 Q. B. D. 555; *Mason* v. *Wood*, (1875) 45 L. J. C. P. 76; 1 C. P. D. 63.

Warrants of attorney, cognovits, judges' orders enrolled in the Bills of Sale Department of the Central Office, proof of such enrolment may be given in the usual way (*a*), and copies of the documents may be given in evidence, under the Documentary Evidence Act, 1845 (*b*).

§ 1650. The Act of 11 & 12 V. c. 83 relates among other things, to the mode of proving documents enrolled in the respective Duchies of Cornwall and Lancaster. That Act, by section 6, enacts, that "where any deed, certificate, receipt, or other instrument relating to the lands or possessions of the Duchy of Cornwall, shall have been duly enrolled in the office of the said Duchy, the enrolment in the books of the said office, or an examined copy of such enrolment, or a certificate purporting to set forth a true copy of the whole or part thereof, and purporting to be signed and certified by the Keeper of the Records of the Duchy for the time being, shall, in the absence of evidence to the contrary, and without producing the original, or calling any attesting witness, and (in the case of a certified copy) without proof, other than the production of such certificate, that such certified copy is in fact a true copy, be admitted by and before all courts and justices, and in all legal proceedings, to be proof of such original instrument or enrolment thereof, or of so much thereof as the said certified copy purports to set forth, and that the original was duly made, granted, given, or executed by the parties thereto." Section 14 of the same Act extends the provisions just set out to all instruments enrolled in the Duchy of Lancaster since August 31, 1848. Enrolments of land in the same Duchies (*c*) may probably also be proved in the manner authorised by the general rule already set out (*d*).

§ 1650A. The Yorkshire Registries Act, 1884 (*e*), contains, in addition to the sections already referred to at page 1402, some special provisions which deserve notice. It provides that the registrar, or his deputy, shall endorse on each instrument registered a certificate stating the date of registration, and the volume, page, and number in the register in which it is enrolled; that this certificate shall then be signed by the registrar and sealed with the office seal; and that after this it shall be evidence (*f*), and the signature and seal judicially noticed (*g*). The registrar must also, at the instance of any person, cause an official search to be made in the office books, and furnish a certificate of the result under his hand, and the office seal; and every certificate so signed and sealed, shall be receivable in evidence (*h*). Then comes section 22, which, after authorising any person,—subject to the pro-

(*a*) See *supra*, § 1646.
(*b*) See *ante*, § 7.
(*c*) See *Kinnersley* v. *Orpe*, (1779) 1 Doug. 58.
(*d*) § 1646.
(*e*) 47 & 48 V. c. 54.
(*f*) Section 9.
(*g*) Section 32.
(*h*) Sections 20, 21.

visions of the Act, and to any rules made thereunder,—to require a certified copy of, or extract from, any document enrolled in the register, or of or from any entry in the register, or any book or index kept at the office, or any rule made under the Act, proceeds to enact, that "thereupon a certified copy or extract, signed by the registrar and sealed with the seal of the register office, shall be given to such person; and every such copy or extract, so signed and sealed, shall be receivable as evidence of the contents of such document or entry, in every case where such contents may under the rules of evidence be proved by means of any copy or extract; but nothing in this section contained shall be taken to dispense with the production of any original document, in any case in which the production thereof might otherwise be required, nor to dispense with any proof, which might otherwise be required, as to the due making and execution thereof." Section 44 gives directions that "all registers, books, indexes, and other documents and instruments in or belonging" to the old registries abolished by this Act, shall "be vested in the Clerks of the Peace" for the respective ridings, and be held by them for the purposes of the Registry, and be disposed of as the county authority may direct; and it then further enacts, that such county authority shall provide for the deposit and safe custody of all these documents in the new registry offices, and for the making of searches therein and of copies thereof. By virtue of section 45, all copies of enrolments of bargains and sales enrolled in the old registries, and of the entries or enrolments of deeds, wills, writings, or conveyances registered at full length in the old registry for the North Riding, shall be signed by the registrar and sealed with the seal of the office; and all copies so signed and sealed shall be as good evidence as attested copies under the old law (*i*).

§ 1650B. An Act of the reign of Queen Anne (*k*) authorises the registration of every "deed, conveyance, will, or probate of the same" relating to land in Middlesex. This Act has been partially repealed by the Land Registry (Middlesex Deeds) Act, 1891 (*l*). This latter Act contains (*m*) enactments by which the registration and enrolment of deeds as to lands in Middlesex are now governed. Those as to certificates of enrolment (*n*), and of searches (*o*), are, generally speaking, the same as under the Yorkshire Registries Act, 1884; but these certificates need only be signed "by an officer of the registry," and—

(*i*) The old statutes, now repealed by this new Act, required the copies to be attested by "two credible witnesses." See *ante*, § 1645, *ad fin.*; also 5 A. c. 18, s. 2; 6 A. c. 35, s. 17; and 8 Geo. 2, c. 6. s. 21.

(*k*) 7 A. c. 20. See *ante*, § 1127.

(*l*) 54 & 55 V. c. 64.

(*m*) *Id.*, Sched. 1.

(*n*) Sched. I., r. 7.

(*o*) R. 11.

unlike those in Yorkshire—require no official seal. Certificates of searches are now directed to be given by the registrar (*p*).

§ 1651. Again, under the Act of 2 & 3 W. 4. c. 87, which is one of the statutes regulating the office at Dublin for the registration of deeds, conveyances, and wills in Ireland, office copies of the memorials registered are rendered admissible in evidence under certain restrictions; for section 32 of that statute enacts, that "in all proceedings before any court of justice, for all purposes whatsoever, an office copy of any memorial registered in the said office shall, upon such office copy being proved in like manner as an office copy of any other record, be received and taken as evidence of the contents of the memorial of which it purports to be an office copy, without the production of the original memorial: provided always, that the party producing such office copy shall, if out of Dublin ten days, and if in Dublin eight days, before producing the same, give notice in writing to the adverse party thereof; and provided also, that such adverse party shall not within four days after receiving such notice, demand by a counter notice that the original memorial shall be produced; and in every case in which such counter notice shall be given, the costs of producing the original memorial shall be paid by either party, as the court in which the proceeding shall take place, or the taxing officer of such court, may determine."

§ 1652. To prove a judgment mortgage under the Irish Act of 13 & 14 V. c. 29, ss. 6 and 7, the chain of evidence consists of three links: First, the judgment must be proved in the usual way; next the affidavit, which is filed in the court when the judgment is entered, must be proved by an office, or a certified, or an examined copy; and, lastly, the due registration of an office copy of this affidavit in the office for registering deeds and wills in Ireland, must be proved either by an examined or by a certified copy (*q*). It seems, too, to be still a question of doubt whether such last-named copy will be received in evidence, unless the notice required by the Act, just cited, of 2 & 3 W. 4, c. 87, s. 32, has been duly given (*r*).

§ 1653. To render a parson's deed of relinquishment available under the Clerical Disabilities Act, 1870 (*s*), first, the deed must be enrolled in the Enrolment Department of the Central Office (*t*), and next, an office copy of it must be recorded by the bishop. The statute

(*p*) The registrar's signature does not require to be proved in any way. See 8 & 9 V. c. 113, s. 1, cited *ante*, § 7.

(*q*) See *Duncan* v. *Brady*, (1860) 12 Ir. C. L. R. 171; 13 & 14 V. c. 72, s. 9.

(*r*) See also ss. 3 and 7 of 13 & 14 V. c. 29, as to the effect of registration.

(*s*) 33 & 34 V. c. 91.

(*t*) Ord. LXI., rr. 1, 9.

then provides, in section 7, that "a copy of the record in the registry of the diocese, duly extracted and certified by the registrar of the bishop, shall be evidence of the due execution, enrolment, and recording of the deed, and of the fulfilment of all the requirements of the Act in relation thereto." The above section must be read in connection with the Documentary Evidence Act, 1845.

§ 1653A. Every *bargain and sale* passing an inheritance or freehold within the operation of 27 H. 8, c. 16 (*u*), must be enrolled in the Enrolment Office Department of the Central Office, as already mentioned. Proof of such enrolment is given in the way already pointed out.

§ 1654. *Conveyances of lands in mortmain* (*v*), whether they have been made previously to, or under the provisions of, the Mortmain and Charitable Uses Act, 1888 (*x*), require enrolment. Enrolments of conveyances of lands in mortmain (*y*) may be proved in the manner indicated in the general rule set out already (*z*). They may also be proved in accordance with the statutory provisions relating to the old Chancery Enrolment Office (*a*). We have already seen (*b*) how deeds enrolled with the Charity Commissioners, under the provisions of the Charitable Trusts Act, 1855 (*c*), may be proved.

§ 1654A. It being by the Fines and Recoveries Act, 1833 (*d*), required (*e*) that all *disentailing deeds* shall be enrolled in the Enrol-

(*u*) The explanation of this statute is too lengthy and technical to be given here. It forms a leading feature in the history of the Statute of Uses (27 H. 8, c. 10), and of the system of conveyancing based upon "uses." It is practically of purely historical interest, the system of conveyancing to which it related having long since become obsolete. But in the investigation of old titles it may still be necessary to recur to its provisions, and indeed it is still in force in the sense that it would still operate, if not complied with, to defeat a "bargain and sale" unenrolled, if any one were so ill advised as to resort to that obsolete form of transaction in preference to adopting more modern methods. Williams on Real Property, or any other standard text book on Real Property may be referred to for an explanation of the subject.

(*v*) As to which, see *ante*, § 1119.

(*x*) 51 & 52 V. c. 42, s. 4 (1).

(*y*) As to which, see *ante*, § 1119. In *Doe* v. *Lloyd*, (1840) 1 M. & Gr. 685; 10 L. J. C. P. 128; 56 R. R. 508, a deed, requiring enrolment under the Mortmain Act, was produced at the trial, and bore the following indorsement:—"Inrolled in the High Court of Chancery the 17th of December, 1836, being first duly stamped, according to the tenor of the statutes made for that purpose. D. Drew." The court held that, without proving the signature or official character of Mr. Drew, the memorandum was evidence that the deed was enrolled on the day stated, it having been certified to the court by an officer of the enrolment office, that the memorandum was in the usual form. See *ante*, § 21.

(*z*) *Supra*, § 1646.

(*a*) See § 1646, note

(*b*) See *ante*, § 1127.

(*c*) 18 & 19 V. c. 87.

(*d*) 3 & 4 W. 4, c. 74.

(*e*) See *ante*, § 1122.

ment Department of the Central Office; proof of the enrolments of such deeds may be made in accordance with the general principles already indicated (*f*). Similar observations apply to the enrolment, in the same office, of an annuity deed (*g*).

§ 1654B. *Judgments* in order to bind land in England generally require what modern Acts term "registration" rather than "enrolment." By the Land Charges Act, 1900 (*h*), it is provided that "a judgment or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section 5 of the Land Charges Registration and Searches Act, 1888 (*i*). A judgment against land in Ireland, if entered up previously to 15th July, 1850, operates as a charge on the lands of the debtor, and is consequently binding on him and all persons claiming under him, and the creditor has a similar charge to that which he would have had if the debtor, having power to so charge the land, had done it by writing under his hand (*k*); but the above provisions do not apply to lands purchased by a judgment debtor after 15th July, 1850; against which, by the Judgments Mortgage (Ireland) Act, 1850, a judgment creditor has the same rights as a judgment creditor under a judgment obtained after the last-mentioned date (*l*).

§ 1654C. The Land Transfer Acts, 1875 and 1897 (*m*), authorise, and in some cases render compulsory, the registration of title to land in England, and provide for the issue by the registrar of a land certificate to the first registered proprietor of freehold land, stating the title of the proprietor of the land therein (*n*), and for the issue to the first registered proprietor of leasehold land of an office copy of the registered lease (*o*), which copy has a statement indorsed thereon as to whether any declaration as to title of the lessor has been made, and as to any other particulars of the lease entered on the register. A certificate of a charge upon registered land may similarly be issued

(*f*) See *supra*, § 1646.
(*g*) As to which, see *ante*, § 1125.
(*h*) 63 & 64 V. c. 26, s. 2 (1).
(*i*) 51 & 52 V. c. 51. As to the machinery provided for "official searches," and for the certificate thereof, and the legal evidentiary effect thereof, see Elphinstone on Searches, p. 166.
(*k*) 5 & 6 W. 4, c. 55; 3 & 4 V. c. 105.
(*l*) 13 & 14 V. c. 29, s. 6.
(*m*) 38 & 39 V. c. 87; and 60 & 61 V. c. 65. *Ante*, § 1126A.
(*n*) 38 & 39 V. c. 87, s. 10.
(*o*) *Id.*, s. 16.

by the registrar to the proprietor of such charge (*p*). Fresh certificates may be issued upon transfers of registered land or charges to the transferees (*q*). These certificates and office copies must be produced to the registrar upon any subsequent entry being made on the register relating to the land, and an official indorsement is made on the certificate or office copy of any such registered transactions (*r*), and in the case of a sale the certificate or office copy is handed over to the purchaser on completion (*s*). New certificates and office copies may be obtained from the registrar when he is satisfied that the originals have been lost or destroyed (*t*). Land certificates, and certificates of charge, issued as above mentioned, are *prima facie* evidence of the several matters therein contained, and the office copies of registered leases are evidence of the contents of the original leases (*u*). The Act of 1875 further provides (*v*) that any instrument purporting to be sealed with the seal of a district registry shall be admissible in evidence, and if a copy, the same shall be admissible in like manner as the original. The effect of registration under these Acts has been referred to in an earlier part of this work (*x*).

§ 1654D. The enrolment of *articles of clerkship* which, we have seen (*y*), is required to be made in the Enrolment Department of the Central Office, may be proved in the manner pointed out in a previous paragraph as to the proof of documents enrolled in that office, or in the old Petty Bag Office (*z*).

§ 1655. The mode of proving *by-laws* (*a*) varies according to the particular language of the statute or charter, under the authority of which they have been made. For instance, the Companies Clauses Consolidation Act empowers every company to which that Act applies, to make by-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs (*b*); and the production of a written or printed copy pur-

(*p*) S. 22.
(*q*) Ss. 29, 34, 40.
(*r*) 60 & 61 V. c. 65, s. 8 (1).
(*s*) S. 8 (2).
(*t*) *Id.*
(*u*) 38 & 39 V. c. 87, s. 80. As to certificates granted under the old Land Transfer Act of 1862, see *ante*, § 1612 note.
(*v*) *Id.*, s. 120.
(*x*) *Ante*, § 1126A.
(*y*) See *ante*, § 1126.
(*z*) See *supra*, § 1646.
(*a*) As to when by-laws will be inferred from long usage, see *ante*, § 127.
(*b*) 8 & 9 V. c. 16, s. 124, enacts, that "it shall be lawful for the company from time to time to make such by-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such by-laws, and make others, provided such by-laws

porting to have the seal of the company affixed thereto, "shall be sufficient evidence of such by-laws in all cases of prosecution under the same" (*c*).

§ 1656. With respect to such by-laws as any *railway company* is empowered to make for regulating the travelling upon, or using and working, the railway, or for imposing penalties upon persons other than its servants, it would seem that, before they can be enforced, the company must produce either the book containing the originals purporting to be under its seal, or an examined or certified copy of the by-laws (*d*), and must also, perhaps, show, that a certified copy has been sent to the Board of Trade,—or, from the 9th of November, 1846 (*e*), until the 10th of October, 1851 (*f*), to the old Commissioners of Railways,—and has been allowed, or, at least, not disallowed, by these respective bodies (*g*); and further, that the by-laws have been duly published. Due publication is, at least, on the hearing of an information before justices charging a railway passenger with a violation of railway by-laws, sufficiently proved by showing that copies of such by-laws were affixed at each of the two stations at which the defendant entered and left the train (*h*). In many of the earlier Railway Acts a clause was introduced, which rendered it necessary to obtain the sanction of certain justices or other persons to the by-laws made by the company, but the Act of 3 & 4 V c. 97, enacts, in s. 10 (*i*), that "so much of every clause, provision, and enactment in any Act of Parliament herebefore passed, as may require the

be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and a copy of such by-laws shall be given to every officer and servant of the company affected thereby." S. 125 enacts, that "it shall be lawful for the company, by such by-laws, to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such by-laws, as the company shall think fit, not exceeding five pounds for any one offence." S. 126 enacts, that "all the by-laws to be made by the company shall be so framed as to allow the justice, before whom any penalty imposed thereby may be sought to be recovered, to order a part only of such penalty to be paid, if such justice shall think fit."

(*c*) S. 127; 8 & 9 V. c. 113, s. 1, cited *ante*, § 7; *qu.* whether the same proof would suffice, if the by-laws were offered in evidence by the company, in defending an action for false imprisonment.

(*d*) *Motteram* v. *East Coast Ry.*, (1859) 29 L. J. M. C. 57; 7 C. B. (N.S.) 58; 121 R. R. 373; cited *ante*, § 1600.

(*e*) 9 & 10 V. c. 105, s. 2; Gazette of Friday, 6th Nov., 1846.

(*f*) When the Act appointing Commiss. of Rail. was repealed. See 14 & 15 V. c. 64, s. 1.

(*g*) Compare 3 & 4 V. c. 97, ss. 7—9, and 8 & 9 V. c. 20, ss. 108—111. As to proof of the order of the Board of Trade, allowing the by-laws, see *ante* § 1596 note; and, as to proof of a similar order by Commiss. of Rail., see *ante*, § 1596 note.

(*h*) *Motteram* v. *East Coast Ry.*, *supra*.

(*i*) Though this section was repealed by 34 & 35 V. c. 78, the repeal did not affect the law as stated in the text, see s. 17 of the Repealing Act (which is itself repealed by 46 & 47 V. c. 39).

approval or concurrence of any justice of the peace, court of Quarter Sessions, or other person or persons, other than members of the said companies, to give validity to any by-laws, orders, rules, or regulations made by any such company, shall be repealed."

§ 1657. The mode of proof of by-laws in other cases, however, varies, according to the language of the particular statute or charter under which the by-laws have been made. The following examples may be usefully instanced. The production of a printed copy of the by-laws made by the Metropolitan Board of Works, or by a district board, or vestry, under the Metropolis Local Management Act of 1855, "if authenticated by the seal of the board or vestry, shall be evidence of the existence, and of the due making, confirmation, and publication of such by-laws, in all prosecutions under the same, without adducing proof of such seal, or of the fact of such confirmation or publication of such by-laws" (*k*). The powers and duties of the Metropolitan Board of Works are now vested in the London County Council (*l*), and those of the vestries and district boards in the various metropolitan Borough Councils (*m*). So, any by-law made by the Municipal Corporation of Dublin may be proved by a copy under the corporate seal, provided it contain a declaration signed by the Lord Mayor that the by-law has been duly made, published, and allowed, and is still in force (*n*).

§ 1658. So, the special rules which are established in any coal mine, or metalliferous mine, under the Acts of 1 & 2 G. 5, c. 50 and 35 & 36 V. c. 77, may be proved by a copy certified under the hand of one of the Government inspectors; and such copy is also evidence that the rules have been duly established (*o*). Again, a printed copy of the regulations made by any Metropolitan Water Company for the purpose of preventing the waste, misuse, or contamination of water, if dated, and purporting to be made as in the Metropolis Water Act, 1871, is pointed out, and to be authenticated by the seal of such company, is "conclusive evidence of the existence, and of the due making, confirmation, and publication, of such regulations in all prosecutions or proceedings under the same, without adducing proof of such seals, or of the fact of such confirmation or publication of such regulations, or of any of the requirements of the Act relative thereto having been complied with" (*p*). By the Metropolis Water Act, 1902, the undertakings of the metropolitan water companies are

(*k*) 18 & 19 V. c. 120, s. 203.
(*l*) 51 & 52 V. c. 41, s. 40.
(*m*) 62 & 63 V. c. 14, s. 4.
(*n*) 12 & 13 V. c. 97, s. 20.
(*o*) See 1 & 2 G. 5, c. 50, s. 89 (2), and 35 & 36 V. c. 77, s. 30.
(*p*) 34 & 35 V. c. 113, s. 25.

transferred to the Metropolitan Water Board, in which are vested all the rights, powers, authorities and privileges of the various companies (*q*). Certain provisions are to be found in the Salmon Fisheries Act, 1873, for facilitating the proof of by-laws made by any Board of Conservators for a fishery district (*r*). It is worthy of notice that the Explosives Act, 1875 (*s*), though it contains several elaborate provisions for the making and publication of by-laws with respect to the loading and conveyance of gunpowder (*t*), has no clause to regulate or simplify the mode of proving such rules.

§ 1659. Under the Municipal Corporations Act, 1882, "the production of a written copy of a by-law, made by the *council* under that Act, or under any former or present or future general or local Act of Parliament, if authenticated by the corporate seal, shall, until the contrary is proved, be sufficient evidence of the due making and existence of the by-law, and, if it is so stated in the copy, of the by-law having been approved and confirmed by the authority, whose approval or confirmation is required to the making or before the enforcing of the by-law (*u*). Again, by-laws made under the Public Health Act, 1875 (*v*), by any Local Authority other than the council of a borough,—whether they relate to scavenging and cleansing (*x*), or to the keeping of animals (*y*), or to common lodging houses (*z*), or to offensive trades (*a*), or to mortuaries (*b*), or to cemeteries (*c*); or to new buildings (*d*), or to public pleasure grounds (*e*), or to markets (*f*), or to slaughter houses (*g*), or to the licensing of horses, boats, &c.,

(*q*) 2 Ed. 7, c. 41, ss. 3, 46.
(*r*) 36 & 37 V. c. 71, s. 45.
(*s*) 38 & 39 V. c. 17.
(*t*) Ss. 34—38, 84.
(*u*) 45 & 46 V. c. 50, s. 24. See *Robinson* v. *Gregory*, [1905] 1 K. B. 534; 74 L. J. K. B. 367. As to pleading such by-laws, see *Elwood* v. *Bullock*, (1844) 6 Q. B. 384—388. For other enactments respecting the making and proof of by-laws, see the Municipal Corporations (Ireland) Act, 1840, 3 & 4 V. c. 108, ss. 125—127, the Markets and Fairs Clauses Act, 1847, 10 & 11 V. c. 14, ss. 42—49; the Commissioners Clauses Act, 1847, *id.* c. 16, ss. 96—98; the Harbours, Docks, and Piers Clauses Act, 1847, *id.* c. 27, ss. 83—90; the Towns Improvements Clauses Act, 1847, *id.* c. 34, ss. 200—207; the Town Police Clauses Act, 1847, *id.* c. 89, s. 71; and the Port of London Act, 1908 (8 Ed. 7, c. 68), ss. 34, 58.
(*v*) 38 & 39 V. c. 55, ss. 182—188, 326. This last section enacts, that all by-laws made under any of the Sanitary Acts, not inconsistent with this Act, "shall be deemed to be by-laws under this Act."
(*x*) S. 44.
(*y*) S. 44.
(*z*) Ss. 80, 90 : extended 9 Ed. 7, c. 44.
(*a*) S. 113.
(*b*) S. 141.
(*c*) 42 & 43 V. c. 31, s. 1.
(*d*) 38 & 39 V. c. 55, s. 157. Extended to other matters by 53 & 54 V. c. 59, s. 23. Certain school buildings are exempted by 1 & 2 G. 5, c. 32, s. 3.
(*e*) S. 164; extended 53 & 54 V. c. 59, s. 45.
(*f*) S. 167.
(*g*) S. 169.

for hire (*h*), or to hop pickers (*i*),—are provable by copies signed and certified by the clerk of such authority to be true copies, and to have been duly confirmed; and every such copy "shall be evidence, until the contrary is proved, in all legal proceedings of the due making, confirmation (*k*), and existence of such by-laws without further or other proof" (*l*). The same mode of proof is adopted in the Public Health, Ireland, Act, 1878, with respect to all by-laws made by any sanitary authority under that statute (*m*).

§ 1659A. The Merchant Shipping Act, 1894, enables harbour authorities, with the approval of a Secretary of State, to make by-laws for regulating the embarkation and landing of emigrants, and for licensing emigrant posters; and such by-laws are to be published in the London Gazette (*n*).

§ 1660 (*o*). The ADMISSIBILITY AND EFFECT OF PUBLIC DOCUMENTS, as instruments of evidence, will next be considered. And here, following the same course which was pursued, when explaining in what manner public documents might be proved, attention will first be drawn to *Statutes, State Papers*, and other writings of a cognate character. With respect to these documents, it may be generally observed, that, provided they have been duly authenticated in some one of the modes stated above, and their contents be pertinent to the issue, they will be admissible, either as *prima facie* or as conclusive proof of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory *recital*. Thus, where certain public statutes recited that great outrages had been committed in a particular part of the country, and a public proclamation was issued, with similar recitals, and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages, to support the averments to that effect in an information for a libel on the Government in relation thereto (*p*). So, a recital of a state of war, in the preamble of a public statute, is good evidence of its existence, and the war will

(*h*) S. 172.

(*i*) S. 314; extended 45 & 46 V. c. 23, s. 2.

(*k*) As to the confirmation of by-laws made under the above-named Act, see 47 & 48 V. c. 12.

(*l*) 38 & 39 V. c. 55, s. 186. The same mode of proof is adopted with respect to by-laws made by any Local Authority under the Public Parks (Scotland) Act, 1878, 41 & 42 V. c. 8, s. 20.

(*m*) 41 & 42 V. c. 52, s. 223. See ss. 41, 54, 91, 100, 103, 105, 129, of same Act; also 53 & 54 V. c. 59. See, also, the Public Health (London) Act, 1891 (54 & 55 V. c. 76), s. 16.

(*n*) 57 & 58 V. c. 60, s. 362.

(*o*) Gr. Ev. § 491, in some part.

(*p*) *R.* v. *Sutton*, (1816) 4 M. & Sel. 532.

be taken notice of without proof, whether this nation be or be not a party to it (*q*). So, a recital of relationship, even in a *private* Act, has been received by the House of Lords as cogent evidence of pedigree in a peerage case; because such recitals used never to be inserted in a private Act, unless their truth had first been ascertained by the judges, to whom the bill had been referred (*r*). As, however, the evidence in support of private bills is no longer submitted to the judges for approval, recitals inserted in them since this change in the practice would seem to be inadmissible (*s*); for, as a general rule, a local or private statute, though it contains a clause requiring it to be judicially noticed, is not, as against *strangers*, any evidence of the facts recited (*t*); neither does it affect the public with a knowledge of its contents (*u*). The recitals, too, in a public Act are not conclusive evidence; and, therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false (*v*).

§ 1661 (*x*). The *Speech of the Sovereign* in opening Parliament, and the Address of either House to the Crown, would seem to be evidence, in the nature of reputation, of the public matters they recite (*y*). The *Journals*, also, of either House are the proper evidence of the action of that House upon all matters before it, whether legislative, ministerial, or, in the Lords' House, judicial (*z*). The committee of privileges has even admitted an entry in their Journals as evidence of limitations in a patent of peerage, without requiring the production of the patent (*a*). So, a foreign declaration of war, transmitted by the British Ambassador to the Secretary of State's office, and produced by a clerk from that office, is sufficient evidence to prove the date of the commencement of hostilities between two foreign states (*b*). How far diplomatic correspondence may go to establish the facts recited, does not clearly appear (*c*); but, in America,

(*q*) *R.* v. *De Berenger*, (1814) 3 M. & S. 67, 69; 15 R. R. 415.

(*r*) *Wharton Peerage*, (1845) 12 Cl. & F. 302; 69 R. R. 84; *Shrewsbury Peerage*, (1857) 7 H. L. C. 13, 14; 115 R. R. 1.

(*s*) *Shrewsbury Peerage*, *supra*.

(*t*) *Brett* v. *Beales*, (1829) Moo. & M. 421; 8 L. J. (O.S.) K. B. 141; 34 R. R. 499; *Taylor* v. *Parry*, (1840) 1 Man. & G. 604, 619, 622; 9 L. J. C. P. 298; 56 R. R. 459; *D. of Beaufort* v. *Smith*, (1849) 4 Ex. 450, 470; 19 L. J. Ex. 97; 80 R. R. 659; *Cowell* v. *Chambers*, (1856) 21 Beav. 619; 111 R. R. 227; *Mills* v. *Mayor of Colchester*, (1867) L. R. 2 C. P. 476; 36 L. J. C. P. 214; *Polini* v. *Gray*. and *Sturla* v. *Freccia*, 1879) 12 Ch. D.411, 427—437; 49 L. J. Ch. 41, 48—53.

(*u*) *Ballard* v. *Way*, (1836) 1 M. & W. 529; 5 L. J. Ex. 207; 46 R. R. 387.

(*v*) *R.* v. *Greene*, (1837) 6 A. & E. 548.

(*x*) Gr. Ev. § 491, slightly.

(*y*) *R.* v. *Francklin*, (1731) 17 How. St. Tr. 636—638.

(*z*) *Jones* v. *Randall*, (1774) 1 Cowp. 17; *Root* v. *King*, (1827) 7 Cowen, 613.

(*a*) *Ld. Dufferin's Case*, (1837) 4 Cl. & F. 568; *Saye & Sele Peerage*, (1848) 1 H. L. C. 507, 510.

(*b*) *Thelluson* v. *Cosling*, (1803) 4 Esp. 266.

(*c*) See *R.* v. *Francklin*, (1731) 17 How. St. Tr. 638.

such correspondence, communicated by the President to Congress, has been held sufficient proof of the acts of foreign governments and functionaries therein narrated (*d*); and in that country this evidence would seem to be generally admissible, whenever the facts recited are not the principal points in issue, but are required to be proved merely in order to support some introductory averment in the pleadings (*e*).

§ 1662. Under the Documentary Evidence Act, 1868, the Government Gazette,—which term applies equally to the London, the Dublin, and the Edinburgh Gazettes (*f*),—is, as already pointed out (*g*), *prima facie* evidence of any proclamation, order, or regulation" issued by his Majesty, or by the Privy Council, or by any of the principal departments of the government (*h*). At common law, too, the Gazette is admissible evidence of other Acts of State, such as addresses received by the Crown, and the like (*i*). But in regard to the acts of public functionaries, which have no relation, or only a slight relation, to the affairs of government,—such as the appointment of an officer to a commission in the army (*k*), or the King's grant of land to a subject (*l*),—the Gazette, unless rendered admissible by statute, cannot in general be read in evidence.

§ 1663. In some few cases, the Legislature has expressly made this paper *conclusive* evidence of certain facts, which are directed to be published in it. For instance, the production of the Dublin Gazette, "purporting to be printed and published by the King's authority," and containing any proclamation, order, or notice under the Criminal Law and Procedure (Ireland) Act, 1887 (*m*), is conclusive evidence of all the contents of such proclamation, order, or notice, and of the date thereof, and in the case of a proclamation that the district specified in such proclamation is a proclaimed district within the meaning of the provisions of the Act mentioned in the proclamation, and that the proclamation has been duly promulgated, and in the case of an order that it has been duly made. So, the Dublin Gazette is conclusive evidence of any order published in it, which pur-

(*d*) *Radcliffe* v. *Union Insurance Co.*, (1810) 7 Johns. 38, 51; *Talbot* v. *Seeman*, (1801) 1 Cranch (Amer.), 1, 37, 38.

(*e*) *Radcliffe* v. *Union Insurance Co.*, *supra*.

(*f*) 31 & 32 V. c. 37, s. 5.

(*g*) *Ante*, § 1527.

(*h*) 31 & 32 V. c. 37, s. 2.

(*i*) *R.* v. *Holt*, (1793) 5 T. R. 436, 443; *Att.-Gen.* v. *Theakstone*, (1820) 8 Price, 89; 22 R. R. 716; *Picton's Case*, (1806) 30 How. St. Tr. 493; *Van Omeron* v. *Dowick*, (1809) 2 Camp. 44; 11 R. R. 656; B. N. P. 226.

(*k*) *R.* v. *Gardner*, (1810) 2 Camp. 513; 11 R. R. 784; *Kirwan* v. *Cockburn*, (1805) 6 Esp. 233; 8 R. R. 849. But see now by Statute, *ante*, § 1638A.

(*l*) *R.* v. *Holt*, (1793) 5 T. R. 443.

(*m*) 50 & 51 V. c. 20, s. 12.

ports to have been made by the Lord Lieutenant in Council under the provisions of the County Boundary (Ireland) Act, 1872 (*n*). Again, all rules and special rules made under the General Prisons (Ireland) Act, 1877, either by the Lord Lieutenant or by the General Prisons Board, may be conclusively proved by the production of the Dublin Gazette, in which they have been published (*o*). So, the statutes, which respectively regulate the issue of Bank notes in England and Ireland,—after requiring the Commissioners of Stamps and Taxes to publish in the London and Dublin Gazettes respectively certificates containing certain particulars,—enact that the Gazette, in which such publication shall be made, shall be conclusive evidence in all courts of the amount of bank notes, which the banker named in the certificate is by law authorised to issue and have in circulation (*p*); the Irish Act adding, "exclusive of an amount equal to the monthly average amount of the gold and silver coin held by such banker as herein provided."

§ 1664. So, also, an order in Council under the Extradition Act, 1870, becomes, on being published in the London Gazette, "conclusive evidence that the arrangement therein referred to complies with the requisitions of the Act, and that the Act applies in the case of the Foreign State mentioned in the order" (*q*). So, the due publication of final notices, under the Acts relating to the drainage of lands in Ireland (*r*), may be conclusively proved by the production of the Dublin Gazette, in which they shall be published (*s*). So,—as already stated in another connection (*t*),—some of the most important proceedings in bankruptcy are capable of being proved, by the production of a copy of the Gazette in which they have been published.

§ 1665. Gazettes, in common with all other *newspapers*, are frequently offered in evidence with the view of fixing an adversary with *knowledge* of certain facts advertised therein; but here it is always advisable, and sometimes necessary,—unless the case is governed by a special Act of Parliament,—to furnish *some* evidence, from which the jury may infer that the party sought to be affected by the notice has read it. This doctrine applies even to cases where the notice published in the Gazette relates to some public matter, as, for instance, the blockade of a foreign port; for, although, as between nation and nation, the notification of a blockade may, from the moment

(*n*) 35 & 36 V. c. 48, s. 3.
(*o*) 40 & 41 V. c. 49, s. 57.
(*p*) 7 & 8 V. c. 32, s. 15; 8 & 9 V. c. 37, s. 10.
(*q*) 33 & 34 V. c. 52, s. 5.
(*r*) 5 & 6 V. c. 89 : 8 & 9 V. c. 69; 9 & 10 V. c. 4; 10 & 11 V. c. 79.
(*s*) 10 & 11 V. c. 79, s. 4.
(*t*) *Ante*, § 1549. The Irish Bankrupt and Insolvent Act, 1857 (20 & 21 V. c. 60), contains somewhat similar provisions in ss. 358, 364.

it is made by one State to the government of another, bind all the subjects of the latter (*u*), this rule will not extend to suits between private individuals. Therefore, where an action was brought on a ship policy, and the underwriters urged in defence, that the voyage was to a port which the master knew was blockaded, and that consequently the policy was void, the court held that the jury were justified in negativing any knowledge on the part of the master, though it appeared that he was in this country some time after the publication of the Gazette in which the blockade was notified (*v*).

§ 1666. The Gazette containing a *notice of dissolution of partnership* will, indeed, be admissible without any additional proof, as against all persons who have had no previous dealings with the firm (*x*); and even against those who have had such dealings, it will, after formal proof of the actual dissolution by producing the deed, be evidence to show that the partnership was openly dissolved (*y*). Still, in order to deprive the old correspondents of the firm of their right of action against the retiring partner, further evidence must be given than the mere production of the Gazette in which notice of dissolution has been inserted (*z*); and if the defendant be not in a condition to prove that a circular was sent in due course to the plaintiff, he must at least show facts, from which an inference may be drawn that the plaintiff has seen the notice. This may be done in a variety of ways, as by proving that the plaintiff has been in the habit of taking in the Gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice, or has evinced an unusual interest in the affairs of the partnership, and the like (*a*). But it seems not enough to prove that the newspaper was circulated in the immediate neighbourhood of the plaintiff's residence (*b*).

§ 1667. The *admissibility and effect of judicial records* and documents must now be considered; and first, as to *judgments*. Here,

(*u*) *The Neptunus*, (1799) 2 C. Rob. 110; *The Adelaide*, (1799) *id.* 112, n.

(*v*) *Harratt* v. *Wise*, (1829) 9 B. & C. 712; 7 L. J. (O.S.) K. B. 309; 33 R. R. 300. The different conditions prevailing in 1829 and the present day require no elaboration in this connection.

(*x*) *Godfrey* v. *Turnbull*, (1795) 1 Esp. 371; *Newsome* v. *Coles*, (1811) 2 Camp. 617; 12 R. R. 756; *Wright* v. *Pulham*, (1816) 2 Chit. 121; *Hart* v. *Alexander*, (1837) 7 C. & P. 753; 6 L. J. Ex. 129; 46 R. R. 666. See the Partnership Act, 1890 (53 & 54 V. c. 39), s. 36 (2).

(*y*) *Hart* v. *Alexander*, *supra*.

(*z*) *Graham* v. *Hope*, (1793) Pea. 154.

(*a*) *Godfrey* v. *Macauley*, (1795) Pea. 155, n.; *Jenkins* v. *Blizard*, (1816) 1 Stark. 419; 18 R. R. 792; *Hart* v. *Alexander*, *supra*; *Leeson* v. *Holt*, (1816) 1 Stark. 186; 18 R. R. 758.

(*b*) *Norwich and Lowestoft Navigation Co.* v. *Theobald*, (1828) Moo. & M. 153.

if the object be merely to prove the *existence of the judgment, its date,* or *its legal consequences,* the production of the record, or the proof of an examined copy, is conclusive evidence of the facts against all the world. This rests on the ground that a judgment is a public transaction of a solemn character, which must be presumed to be faithfully recorded. Therefore, if a party indicted for any offence has been acquitted, and sues the prosecutor for malicious prosecution, the record is conclusive evidence for the plaintiff to establish the fact of acquittal, although the parties are necessarily not the same in the action as in the indictment (*c*); but it is no evidence whatever, that the defendant was the prosecutor, even though his name appear on the back of the bill (*d*), or of his malice, or of want of probable cause (*e*); and the defendant, notwithstanding the verdict, is still at liberty to prove the plaintiff's guilt (*f*). So, a judgment against a master or principal for the negligence of his servant or agent, is conclusive evidence against the servant or agent of the fact, that the master or principal has been compelled to pay the amount of damages awarded; but it is not evidence of the fact upon which it was founded, namely, the misconduct of the servant or agent (*g*). So, a judgment recovered against a surety will be evidence for him, to prove the amount which he has been compelled to pay for the principal debtor; but it furnishes no proof whatever of his having been legally liable to pay that amount through the principal's default (*h*). The same doctrine will apply to other cases, where the party has a remedy over, as for contribution, or the like (*i*). In an action against a surety, where the defence was that the plaintiff had received certain moneys from the principal in satisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignees of the principal for the amount so received as money had to their use, not indeed as conclusive proof that the money had been paid to him by the principal in the way of fraudulent preference, but as showing that he had actually repaid the money to the assignees, and as generally explaining the transaction (*k*).

§ 1668. If the object be to discredit a witness, by proving that he has given different testimony on a former trial, the judgment in that

(*c*) *Legatt* v. *Tollervey*, (1811) 14 East, 302; 12 R. R. 518.

(*d*) B. N. P. 14.

(*e*) *Purcell* v. *Macnamara*, (1808) 9 East, 361; 9 R. R. 578; *Incledon* v. *Berry*, (1805) 1 Camp. 203, n. *a*.

(*f*) B. N. P. 15.

(*g*) *Green* v. *New River Co.*, (1792) 4 T. R. 590; *Pritchard* v. *Hitchcock*, (1843) 6 Man. & G. 165; *Tyler* v. *Ulmer*, (1815) 12 Mass. 166.

(*h*) *King* v. *Norman*, (1847) 4 C. B. 884, 898; 17 L. J. C. P. 23; 72 R. R. 761.

(*i*) *Powell* v. *Layton*, (1806) 2 N. R. 371; 9 R. R. 660; *Kip* v. *Brigham*, (1810) 7 Johns. 168; *Griffin* v. *Brown*, (1824) 2 Pick. 304.

(*k*) *Pritchard* v. *Hitchcock*, (1843) 6 Man. & G. 151; 12 L. J. C. P. 322; 64 R. R. 736.

cause, though the litigating parties be strangers, will be admissible for the purpose of introducing the evidence of his former statements (*l*). So, upon an indictment for perjury committed on a trial, the production by the officer of the filed copy of the writ (*m*) and of the pleadings (*n*) will sufficiently prove the existence of the action, and the nature of the issues raised therein (*o*); and if a party be indicted for aiding the escape of a felon from prison, the production of the record of conviction from the proper custody, will be conclusive evidence that the prisoner was convicted of the crime stated therein (*p*). So, where a man brought ejectment as heir-at-law, and, for the purpose of establishing his legitimacy, called his mother to prove her marriage before his birth, a statement made by her on cross-examination, that she had never been before certain magistrates to affiliate her son, was allowed to be contradicted by the production of a bastardy order, which purported to have been made on her complaint in regard to the plaintiff by the magistrates in question (*q*). So, in actions against a sheriff (*r*) for an escape and on other occasions it is usual to give in evidence judgments against third persons, to show the character in which the plaintiff claims, and the amount of damage he has sustained (*s*). So, if A. sues the sheriff for trespass to his goods, the latter may give in evidence a judgment against B., and then show that he seized the goods by virtue of a *fieri facias* upon that judgment, and that the goods belonged to B. (*t*). So (*u*), where the judgment constitutes one of the muniments of a party's title to land or goods—as where a deed was made under a decree in Chancery (*v*), or goods were purchased at a sale made by a sheriff upon an execution (*x*)—the record may be given in evidence against a party who is a stranger to it. So, in an action to recover lands, a decree in a suit between the defendant's father, and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate as his own property, has been held admissible on behalf of the defendant, not as proof of the fact that the property was his, or of any of the other facts stated, but

(*l*) *Clarges* v. *Sherwin*, (1699) 12 Mod. 343; *Foster* v. *Shaw*, (1821) 7 Serg. & R. 156.

(*m*) Filed under R. S. C. Ord. V., r. 13.

(*n*) Filed under R. S. C. Ord. XLI., r. 1.

(*o*) *R.* v. *Scott*, (1877) 2 Q. B. D. 415.

(*p*) *R* v. *Shaw*, (1823) R. & R. 526. A certificate of the conviction would also be evidence. See *ante*, §§ 1612—1614.

(*q*) *Watson* v. *Little*, (1860) 29 L. J. Ex. 267; 5 H. & N. 472; 120 R. R. 692.

(*r*) It should here be noted that a sheriff is no longer liable to an action for an escape, 50 & 51 V. c. 55, s. 16; 40 & 41 V. c. 49, s. 43.

(*s*) *Davies* v. *Lowndes*, (1835) 1 Bing. N. C. 607; 4 L. J. C. P. 214; 53 R. R. 266; *Adams* v. *Balch*, (1827) 5 Greenl. 188.

(*t*) 1 St. Ev. 255.

(*u*) Gr. Ev. § 539, as to three lines.

(*v*) *Barr* v. *Gratz*, (1819) 4 Wheat. 213.

(*x*) 1 St. Ev. 255; *Witmer* v. *Schlatter*, (1830) 2 Rawle, 359; *Jackson* v. *Wood*, (1829) 3 Wend. 27, 34; *Fowler* v. *Savage*, (1819) 3 Conn. 90, 96.

for the purpose of explaining in what character the father, through whom the defendant claimed, had afterwards taken actual possession of the estate, and to rebut the suggestion that he had been let into possession merely as a receiver (*y*). Many other instances might be given of the admissibility of judgments *inter alios*, where the *record is matter of inducement*, or merely introductory to other evidence; but those cited will suffice to illustrate the principle.

§ 1669. *Adjudications* are sometimes tendered in evidence for *the purpose of protecting the magistrates who pronounced, and the officers who enforced, them*, against an action of trespass. And here the rule of law is, that, provided the adjudication, when read in connection with the other proceedings, shows, either expressly or by fair and necessary inference, that the judge had jurisdiction over the subject-matter, it will furnish conclusive evidence of the truth of the facts stated in it, even if those facts are necessary to give the judge jurisdiction (*z*); or, perhaps, it may be more correctly stated, that the production of the judgment, and of the proceedings on which it is founded, will be a bar to all inquiry respecting the truth or falsehood of the facts stated, and will conclusively establish the immunity of the judge (*a*). The above doctrine, which is essential to the administration of the law—since, without it, who would be found so bold as to act as a magistrate?—is occasionally prayed in aid for the protection of judges of even courts of record; because—although by an excellent law of very great antiquity, no action will lie against such personages for an erroneous judgment, or for any other act done by them in the exercise of their judicial functions, and within the general scope of their jurisdiction (*b*)—yet this protection does not extend to cases where the judge, either wilfully, or under a mistake not of fact but of law, acts wholly without jurisdiction (*c*). Still, the rule in question, though sometimes available on occasions of greater importance, is generally applied to, and will certainly be best illustrated by, those cases, in which justices of the peace have been sued by parties who imagined themselves wronged by a conviction or order.

(*y*) *Davies* v. *Lowndes supra.*

(*z*) See and compare *Taylor* v. *Clemson*, (1844) 2 Q. B. 1031, 1032; 11 L. J. Ex. 447; 65 R. R. 273, per Tindal, C.J., delivering the judgment of Ex. Ch.; *Basten* v. *Carew*, (1825) 3 B. & C. 652, 653; 3 L. J. (O.S.) K. B. 111; 27 R. R. 453, per Ld. Tenterden; *Brittain* v. *Kinnaird*, (1819) 1 Br. & B. 437; 21 R. R. 680, per Dallas, C.J.; 442, 443, per Richardson, J.; *Betts* v. *Bagley*, (1832) 12 Pick. 572, 582, per Shaw, C.J.

(*a*) *Aldridge* v. *Haines*, (1831) 2 B. & Ad. 408; 9 L. J. (O.S.) K. B. 202, per Parke, J.; 1 St. Ev. 255.

(*b*) *Garnett* v. *Ferrand*, (1827) 6 B. & C. 611, 625; 5 L. J. (O.S.) K. B. 270; 30 R. R. 467; *Floyd* v. *Barker*, (1607) 12 Co. 25; *Fray* v. *Blackburn*, (1863) 3 B. & S. 576; 129 R. R. 463; *Scott* v. *Stansfield*, (1868) L. R. 3 Ex. 220; 37 L. J. Ex. 155.

(*c*) *Anderson* v. *Gorrie*, (1894) 71 L. T. 382; *Houlden* v. *Smith*, (1850) 14 Q. B. 841; *Calder* v. *Halket*, (1839) 3 Moo. P. C. 28; 50 R. R. 1.

§ 1670. *Brittain* v. *Kinnaird* (*d*) is a leading authority on this subject. That was an action of trespass against magistrates for taking and detaining a vessel. At the trial it appeared that the vessel was seized by the defendants, as magistrates, under the Bum-boat Act now repealed (*e*), and the plaintiff sought to prove that it was not a boat within the meaning of the Act; but this he was not permitted to do, on the ground that the conviction was the only evidence of what the magistrates had determined. The conviction was then put in, and as no defects appeared upon the face of it, and as the vessel was there called a boat, it was held to constitute a conclusive defence to the action, and the plaintiff was accordingly nonsuited. On a motion for a new trial, it was strongly urged that the magistrates had no right to assume to themselves jurisdiction, by calling that a boat which was in fact a ship; and it was asked whether a justice could seize a seventy-four gun vessel, and then justify the legal detention by describing it in the conviction as a boat. To this it was answered by the court that, supposing such a thing done, the conviction would still be conclusive, and the party would be without civil remedy, though a decision so gross would undoubtedly be good ground for a criminal proceeding against the justice (*f*); and Richardson, J., observed, "whether the vessel in question were a boat or not, was a fact on which the magistrate was to decide, and the fallacy is in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction" (*g*).

§ 1671. Again, where a justice, acting under the Highway Act, 1835 (*h*), had issued an order for the removal of certain timber encumbering the highway, and an action of trespass was in consequence brought against him by the owner of the timber, it was held that the plaintiff could not prove, in contradiction to the order, that the place where the wood was lying was no part of the highway (*i*). So, where two magistrates were sued in trespass for having given the plaintiff's landlord possession of a farm as a deserted farm, under statutory powers, the production of the record of their proceedings, which set forth the facts necessary to give them jurisdiction, and by which it appeared

(*d*) (1819) 1 Br. & B. 432. In *Mould* v. *Williams*, (1844) 5 Q. B. 473; 64 R. R. 558, Coleridge, J., observed, "*Brittain* v. *Kinnaird* has been oftener recognised than almost any modern case." See *Ayrton* v. *Abbott* (1849) 14 Q. B. 1.

(*e*) 2 G. 3, c. 28; repealed by 2 & 3 V. c. 47, s. 24.

(*f*) 1 Br. & B. 438, 439, cited with approbation by Coleridge, J., in *R.* v. *Buckinghamshire JJ.*, (1843) 3 Q. B. 809; 12 L. J. M. C. 29.

(*g*) 1 Br. & B. 442, cited by Ld. Denman as an admirable judgment in *R.* v. *Bolton*, (1841) 1 Q. B. 74; 10 L. J. M. C. 49; 55 R. R. 209.

(*h*) 5 & 6 W. 4, c. 50, s. 73.

(*i*) *Mould* v. *Williams*, *supra*.

that they had pursued the directions of the statute, was held to be a conclusive answer to the action, and the plaintiff, consequently, was not permitted to prove that the farm, in point of fact, was not deserted (*k*). Many other cases might be cited in support of the general proposition, that where (supposing the facts alleged to be true) a magistrate or other judicial personage has jurisdiction, his jurisdiction, and consequent immunity from an action, cannot be made to depend upon the truth or falsehood of those facts, or on the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them (*l*).

§ 1672. It must be carefully remembered that this rule protects justices only when acting in a *judicial* capacity; and those executive officers who execute their warrants. Therefore, if an action of trespass be brought against magistrates for issuing a warrant of distress to enforce payment of a highway-rate (in respect of which their functions were "ministerial," as it was termed, and not "judicial"), they will have no defence, should the rate prove invalid; for although the rate must be good in order to give them jurisdiction, they cannot judicially decide upon its validity, and the consequence is, that their warrant cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate depends (*m*). The same doctrine applies to warrants of distress for borough rates issued by the mayor (*n*); and it was also formerly applicable to all distress warrants, which had been granted by justices for the purpose of compelling the payment of a poor-rate. This inconvenience has been remedied by statute, for it is now enacted by section 4 of the Act of 11 & 12 V. c. 44, "that, where any poor-rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein."

§ 1673. In many cases a judgment is tendered in evidence, not merely to prove its existence and its legal consequences, or to protect

(*k*) *Basten* v. *Carew*, (1825) 3 B. & C. 649; 3 L. J. (O. S.) K. B. 111; 27 R. R. 453.

(*l*) *Cave* v. *Mountain*, (1840) 1 Man. & G. 257, 262; 9 L. J. M. C. 90; 56 R. R. 338; cited with approbation in *R.* v. *Bolton*, *supra*; *In re Clarke*, (1842) 2 Q. B. 619; 11 L. J. Q. B. 75; 57 R. R. 741; *Anon.*, (1830) 1 B. & Ad. 382; *R.* v. *Walker*, (1843) 2 M. & Rob. 457; *Gray* v. *Cookson*, (1812) 16 East, 13; *R.* v. *Hickling*, (1845) 7 Q. B. 880; 14 L. J. M. C. 177; 68 R. R. 582.

(*m*) *Mould* v. *Williams*, (1844) 5 Q. B. 476; 64 R. R. 558; *Weaver* v. *Price*, (1832) 3 B. & Ad. 409; *Morrell* v. *Martin*, (1841) 3 Man. & G. 593; 11 L. J. M. C. 22; 60 R. R. 590; *Ld. Amherst* v. *Ld. Somers*, (1788) 2 T. R. 372; 1 R. R. 497; *Nicholls* v. *Walker*, (1634) Cro. Car. 394.

(*n*) *Fernley* v. *Worthington*, (1840) 1 Man. & G. 491; 10 L. J. M. C. 81. See *Newbould* v. *Coltman*, (1851) 6 Ex. 189; 20 L. J. M. C. 149.

the party who pronounced it against legal proceedings, but in order to *conclude an opponent* upon the *facts determined*; and for this purpose the rules which govern the admissibility of the record will vary according to the nature of the judgment. Thus, if it be *judgment in rem*, it will bind all persons whomsoever; and this, too, probably, although it has not been pleaded (*o*); but if it be a *judgment inter partes*, it will, in general, bind only parties and privies thereto (*p*); and even as against them, it will not, as it seems, be regarded as absolutely conclusive evidence, unless it be specially pleaded by way of estoppel. Where the point could have been taken on the pleadings (*q*), a judgment whether *in rem* or *inter partes* must in order to act as an estoppel be a judgment of a court of competent jurisdiction, therefore a judgment of a court on a matter beyond its jurisdiction binds neither strangers nor parties nor privies (*r*).

§ 1674. A *judgment in rem* has been defined to be "an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose" (*s*). It has been pointed out that there is "no distinction between a judgment *in rem* and a judgment *in personam* excepting that in the one the point adjudicated upon (which in a judgment *in rem* is always as to the status of the *res*) is conclusive against all the world as to that status, whereas in the other the point, whatever it may be, which is adjudicated upon, it not being as to the status of the *res*, is only conclusive between parties and privies" (*t*). In general, therefore, a judgment *in rem* furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties; but this rule does not extend either to criminal convictions, which are subject to the same rules of evidence as ordinary judgments *inter partes* (*u*); indeed, such judgments would not seem to be judgments *in rem* at all,

(*o*) *Hannaford* v. *Hunn*, (1825) 2 C. & P. 155; *Cammell* v. *Sewell*, (1860) 5 H. & N. 742; 29 L. J. Ex. 350; 120 R. R. 799; *Magrath* v. *Hardy*, (1838) 4 Bing. N. C. 796; 7 L. J. C. P. 299; 44 R. R. 861.

(*p*) 2 Smith, L.C., 12th ed., p. 781.

(*q*) *Ante*, § 91; *post*, § 1684. Under the present pleading rule, Ord. XIX., r. 4, every pleading must now contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence; under this rule it is submitted that estoppels by judgments both *in rem* and *in personam* should be pleaded.

(*r*) *Toronto Ry.* v. *Corporation of Toronto*, [1904] A. C. 809; 73 L. J. P. C. 120.

(*s*) 2 Smith L. C. (11th ed.) 752. A judgment *in rem* has in Ireland been defined as "a judgment of a court having special jurisdiction over the subject-matter," see *McDonall* v. *Alcorn*, (1894) 1 Ir. R. 274, 278. This appears to be inaccurate, see 2 Smith L. C. (12th. ed.), 776.

(*t*) *Ballantye* v. *Mackinnon*, [1896] 2 Q. B. 455, 462; 65 L. J. Q. B. 616.

(*u*) *R.* v. *Turner*, (1832) 1 Moo. C. C. 347; *R.* v. *Ratcliffe*, (1832) 1 Lewin C. C. 122; *R.* v. *Blakemore*, (1852) 2 Den. C. C. 410; *Keable* v. *Payne*, (1838) 8 A. & E. 560; 7 L. J. Q. B. 218; *Blakemore* v. *Glamorgan Canal Co.*, (1835) 2 Cr. M. & R. 139, explaining *Smith* v. *Rummens*, (1807) 1 Camp. 9; and *Hathaway* v. *Barrow*, (1807) *id.* 151. See *post*, § 1693.

except, perhaps, in so far as a conviction for felony amounts to a judgment that the person convicted is a felon: and a conviction of a man for a felony (or *semble* any other crime) is admissible as against him or his legal representatives in a subsequent civil action, not merely as proof of his conviction, but also as *prima facie* evidence that he committed the crime (*v*). Inquisitions in lunacy, inquisitions *post mortem*, or other inquisitions, which though regarded as judgments *in rem*, so far as to be admissible in evidence of the facts determined against all mankind, are considered as not conclusive evidence (*x*). Thus, it has been repeatedly ruled, that an inquisition in lunacy (*y*), though admissible against strangers, is not conclusive proof of what was the state of mind of the supposed lunatic at the time of the inquiry (*z*); and the same rule has been applied to most other inquisitions (*a*). An order made in affiliation proceedings is not a judgment *in rem* (*b*), neither is an order to wind up a company (*c*).

§ 1675. Though, for the reasons just given, the above definition of a judgment *in rem* cannot be considered perfect, yet it would be extremely difficult, if not impossible, to enunciate any other, which would be open to fewer objections. Without, therefore, attempting a

(*v*) *In the goods of Crippen*, [1911] P. 108; 80 L. J. P. 47.

(*x*) *Irish Society* v. *Bishop of Derry*, (1846) 12 Cl. & F. 666.

(*y*) See the Lunacy Act, 1890 (53 & 54 V. c. 5).

(*z*) *Faulder* v. *Silk*, (1811) 3 Camp. 126; 13 R. R. 771; *Hassard* v. *Smith* (1872) Ir. R. 6 Eq. 429; *Dane* v. *Kirkwall*, (1838) 8 C. & P. 683; 55 R. R. 860; *Frank* v. *Frank*, (1840) 2 M. & Rob. 315, 316, n.; *Sargeson* v. *Sealy*, (1742) 2 Atk. 412; *Bannatyne* v. *Bannatyne*, (1852) 2 Roberts. 475—477; *Hume* v. *Burton*, (1785) 1 Ridg. P. C. 204; *Den* v. *Clark*, (1828) 5 Halst. 217; *Hart* v. *Deamer*, (1831) 6 Wend. 497. See *Prinsep and East India Co.* v. *Dyce Sombre*, (1856) 10 Moore P. C. 232, 239, 244—247; 110 R. R. 38. An order made by a master in lunacy reciting that the defendant was, in the opinion of the master, a person of unsound mind, though not so found by inquisition, although not conclusive, is *prima facie* evidence of the facts stated therein being an order made by a competent tribunal in a matter within its jurisdiction: *Harvey* v. *Rex*, [1901] A. C. 601; 70 L. J. P. C. 107.

(*a*) *Stokes* v. *Dawes*, (1826) 4 Mason, 268, per Story, J. In *Jones* v. *White*, (1717) 1 Str. 68, the court was divided upon the question, whether a coroner's inquest, finding a person who had destroyed himself lunatic, was admissible at all as evidence of his insanity on an issue on that fact. At the present day the verdict of a coroner's jury is not receivable in evidence in any civil proceeding: *Bird* v. *Keep*, [1918] 2 K. B. 692; 87 L. J. K. B. 1199; [1918] W. C. & Ins. Rep. 322. An inquisition by a sheriff's jury, taken prior to the Interpleader Act, 1 & 2 W. 4, c. 58, for the purpose of ascertaining to whom goods seized under a *fi. fa.* belonged, has been held to be wholly inadmissible, as not being an inquisition under the King's writ, but merely a proceeding by the sheriff of his own authority. *Glossop* v. *Pole*, (1814) 3 M. & S. 175; *Latkow* v. *Eamer*, (1795) 2 H. Bl. 437. See *Read* v. *Victoria St. and Pimlico Ry.*, (1863) 1 H. & C. 826; 32 L. J. Ex. 167; 130 R. R. 788; *Horrocks* v. *Metropolitan Ry.*, (1863) 4 B. & S. 315; 32 L. J. Q. B. 367; 129 R. R. 762; *Chapman* v. *Monmouths. Ry. and Canal Co.*, (1857) 2 H. & N. 267; 27 L. J. Ex. 97; 115 R. R. 524; and *R.* v. *London and N. Western Ry.*, (1854) 3 E. & B. 443; 23 L. J. Q. B. 185; 97 R. R. 584, as to the effect of an inquisition before a sheriff's jury under section 68 of the Lands Clauses Consolidation Act, 1845 (8 & 9 V. c. 18).

(*b*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620.

(*c*) *In re Bowling and Welby's Contract*, [1895] 1 Ch. 663; 64 L. J. Ch. 427.

hopeless task, it may be deemed sufficient for all practical purposes, to furnish a tolerably correct list of those adjudications, which may, with a reasonable degree of certainty, be regarded as *judgments in rem.* This list will be found to contain judgments of condemnation of property as forfeited, whether pronounced by the old Court of Exchequer (*d*), or now by the King's Bench Division on the Revenue side, or by the commissioners or sub-commissioners of excise, inland revenue, or customs (*e*)—adjudications in the old Court of Admiralty, now the Probate, Divorce and Admiralty Division, on the subject of prize (*f*)—or for the enforcement of a maritime lien (*g*)—sentences of divorce *a mensâ et thoro* (*h*) under the old law, and of judicial separation, under the existing law (*i*)—decrees dissolving marriage (*k*)—decrees in other matrimonial suits (*l*), provided the *status* of the parties be affected thereby (*m*), but not decrees in suits for jactitation of marriage, unless, perhaps, in cases where the defendant pleads a marriage, and the court decides on the truth of that plea (*n*)—grants of

(*d*) *Geyer* v. *Aquilar*, (1798) 7 T. R. 696; 4 R. R. 543; *Scott* v. *Shearman*, (1775) 2 W. Bl. 977; *Cooke* v. *Sholl*, (1793) 5 T. R. 255.

(*e*) *Maingay* v. *Gahan*, (1793) 1 Ridg. P. C. 43, 44, n. There the Irish Ex. Ch. expressly overruled *Henshaw* v. *Pleasance*, (1777) 2 W. Bl. 1174, a decision which, according to Fitzgibbon, C. (see Ridg. L. & S. 79), was reprobated by Ld. Mansfield in *Dixon* v. *Cock*, and was frequently condemned by Lord Lifford, C. See, also, *Roberts* v. *Fortune*, (1742) 1 Harg. L. Tuacta, 468 n., per Lee, C. J.; *Terry* v. *Huntington*, (1669) Hardr. 480; and *Fuller* v. *Fotch*, (1695) Carth. 346, all which cases are also at variance with *Henshaw* v. *Pleasance*.

(*f*) *Le Caux* v. *Eden*, (1781) 2 Doug. 612; *Lindo* v. *Rodney*, (1782) *id.* 614, per Ld. Mansfield. For other proceedings *in rem* in the Court of Admiralty, see *Harmer* v. *Bell*, (1851) 7 Moore P. C. 267; 83 R. R. 43; and see, also, *Cammell* v. *Sewell*, (1860) 5 H. & N. 742; 29 L. J. Ex. 350; 120 R. R. 799; *Simpson* v. *Fogo*, (1860) 1 Hem. & M. 195; 32 L. J. Ch. 249; 136 R. R. 90; *Castrique* v. *Imrie*, (1869) L. R. 4 H. L. 414; 39 L. J. C. P. 350; and *Imrie* v. *Castrique*, (1860) 8 C. B. (N.S.) 405.

(*g*) *The City of Mecca*, (1880) 5 P. D. 28; 49 L. J. P. 17. The original action in this case was to recover damages for collision.

(*h*) *R.* v. *Grundon*, (1775) 1 Cowp. 322; *Day* v. *Spread*, (1842) Jebb. & B. 163.

(*i*) 20 & 21 V. c. 85, ss. 7 & 16.

(*k*) *Id.*, ss. 27 & 31.

(*l*) *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60; *Da Costa* v. *Villa Real*, (1734) 2 Str. 961; *Bunting's Case*, (1585) 4 Co. 29; *Kenn's Case*, (1607) 7 Co. 42; *Perry* v. *Meddowcroft*, (1846) 10 Beav. 122; *Harrison* v. *Corporation of Southampton*, (1853) 22 L. J. Ch. 372. But see *Goodin* v. *Smith*, (1831) Milwards Ecc. 243—245. As to decrees under the Legitimacy Declaration Act, 1858, see that Act, 21 & 22 V. c. 93; and *Shedden* v. *Att.-Gen. & Patrick*, (1860) 2 Sw. & Tr. 170; 30 L. J. Pr. & Mat. 217, S. C.

(*m*) *Needham* v. *Bremmer*, (1866) L. R. 1 C. P. 583; 35 L. J. C. P. 313. See *Conradi* v. *Conradi*, (1867) L. R. 1 P. & D. 514. A decree of divorce, however, in a case in which A. was co-respondent stating that the jury found that the respondent had been guilty of adultery with the co-respondent, but which contained no finding that the co-respondent had been guilty of adultery with the respondent, is not sufficient evidence of the adultery of A. in subsequent divorce proceedings against him; *Ruck* v. *Ruck*, [1896] P. 152; 65 L. J. P. 87. Even although a decree nisi for divorce has been set aside on some other ground, the finding of the jury of adultery and cruelty is conclusive evidence *inter partes* in a subsequent suit; *Butler* v. *Butler*, [1894] P. 25; 63 L. J. P. D. 1.

(*n*) *R.* v. *Duchess of Kingston*, (1776) 20 How. St. Tr. 543.

probate (*o*)—and administration (*p*)—adjudications in bankruptcy (*q*)—sentences of deprivation and expulsion, whether delivered by the Spiritual Court, a visitor, or a college (*r*)—old judgments of outlawry (*s*)—adjudications of settlement by an order of justices, whether unappealed against (*t*), or confirmed by a Court of Quarter Sessions on appeal (*u*)—orders of justices for dividing roads under the Act of 34 G. 3, c. 64 (*v*)—decisions of justices under the Private Street Works Act, 1892 (*x*), that roads are highways repairable by the inhabitants at large (*y*)—orders of the Medical Council expunging the names of practitioners from the register on the ground of professional misconduct (*z*) and sentences of courts-martial (*a*).

§ 1676. These judgments so far furnish conclusive evidence of the points they decide, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown, either that the court had no jurisdiction (*b*), or that the judgment was obtained by fraud or collusion (*c*), no evidence can be

(*o*) *Noel* v. *Wells*, (1669) 1 Lev. 235, 236; *Allen* v. *Dundas*, (1789) 3 T. R. 125. Although the probate may be conclusive evidence of the title of the executors so long as the decree for probate is in existence a person who was not a party to the suit in which the probate was decreed and who could not have intervened in that suit, is entitled to move to revoke the probate on the ground that the will, probate of which had been decreed, was a forgery; *Young* v. *Holloway*, [1895] P. 87; 64 L. J. P. D. & A. 55.

(*p*) *Bouchier* v. *Taylor*, (1776) 4 Bro. P. C. 708. See *Prosser* v. *Wagner*, (1856) 1 C. B. (N.S.) 289; 26 L. J. C. P. 81; 107 R. R. 668.

(*q*) See *post*, § 1747. The *dismissal* of a bankruptcy petition, however, is not even *res judicata* and the same creditor can take fresh proceedings in bankruptcy in respect of the same debt; *In re Vitoria*, [1894] 2 C. B. 387; *King* v. *Henderson*, [1898] A. C. 720; 67 L. J. Q. B. 447.

(*r*) *Phillips* v. *Bury*, (1788) 2 T. R. 346; *R.* v. *Grundon*, (1775) 1 Cowp. 315, 321, 322.

(*s*) 2 Co. Lit. 352, b. Outlawry in civil proceedings is at length abolished by 42 & 43 V. c. 59, s. 3.

(*t*) *Uxbridge Union* v. *Winchester Union*, (1904) 91 L. T. 533; *R.* v. *Kenilworth*, (1788) 2 T. R. 599.

(*u*) *R.* v. *Wick St. Lawrence*, (1833) 5 B. & Ad. 533; 3 L. J. K. B. 12.

(*v*) *R.* v. *Hickling*, (1845) 7 Q. B. 880.

(*x*) 55 & 56 V. c. 57, s. 8.

(*y*) *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31; 73 L. J. K. B. 88. But not a similar finding under section 150 of the Public Health Act, 1875 (38 & 39 V. c. 55; *R.* v. *Hutchins*, (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35), because under that provision the justices had no jurisdiction to adjudicate on the status of the road: see *Wakefield Corporation* v. *Cooke*.

(*z*) *Hill* v. *Clifford*, [1907] 2 Ch. 236; 76 L. J. Ch. 627.

(*a*) *R.* v. *Suddis*, (1801) 1 East, 306; *Hannaford* v. *Hunn*, (1825) 2 C. & P. 148; *Grant* v. *Gould*, (1792) 2 H. Bl. 100; 3 R. R. 342.

(*b*) *Post*, §§ 1714, *et seq.*

(*c*) *R.* v. *Duchess of Kingston*, (1776) 20 How. St. Tr. 544. See *post*, § 1713. See, however, *Bater* v. *Bater*, *supra*, which if it does not universally negative, at any rate very materially restricts the right of a person not a party to a judgment *in rem* to impeach it for fraud, such judgment remaining itself unimpeached in the court which pronounced it.

admitted, at least in any civil cause (*d*), for the purpose of disproving the facts adjudicated. This rule appears to rest, partly, upon the ground that in most of the above cases every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his own rights, by becoming an actual party to the proceedings (*e*); partly upon the ground that judgments *in rem* not merely declare the *status* of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be; and partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful, but that after having been clearly defined by one solemn adjudication, they should conclusively be set at rest.

§ 1677. Though a judgment *in rem* is thus binding upon all the world as to the precise point directly decided, and, consequently, the decision cannot be impeached in the same or another court, by showing that the facts on which it immediately rests are false (*f*)—yet, like any other judgment, it is conclusive only as to the point actually decided (*g*), and not as to points which incidentally come in question; thus where the facts upon which it rests are themselves put directly in issue in a subsequent suit, the judgment does not—with one exception which will be presently mentioned (*h*)—furnish conclusive evidence of their truth, however necessary it may have been for the court proceeding *in rem* to have determined that question before it adjudicated upon the principal point (*i*). Thus, although the Ecclesiastical Courts were not, and the existing Probate Division of the High Court is not, authorised to grant letters of administration, unless the intestate be dead, these letters are so far from being conclusive evidence of the death, when that fact is put in issue in another court, that on one or two occasions they have not been regarded even as *prima facie* proof (*k*). Again,

(*d*) As to the effect of judgments *in rem* in criminal trials, see *post*, § 1680.

(*e*) 1 St. Ev. 286. This is not an essential foundation for the rule, as it has been held that a sentence of nullity of marriage will be binding upon, and have the effect of bastardising, a child of the parties, who at the time when the sentence was pronounced was *en ventre sa mère*. *Perry* v. *Meddowcroft*, (1846) 10 Beav. 122.

(*f*) *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60; where a person who was not a party to a divorce suit before a foreign tribunal, which had dissolved a marriage, endeavoured unsuccessfully to impeach the decree by suggesting that it had been procured by fraud.

(*g*) *Att.-Gen.* v. *King*, (1817) 5 Price 195; *Concha* v. *Concha*, (1886) 11 A. C. 541; 56 L. J. Ch. 257.

(*h*) *Post*, § 1678.

(*i*) See *Bailey* v. *Harris*, (1849) 12 Q. B. 905; 18 L. J. Q. B. 115.

(*k*) *Thompson* v. *Donaldson*, (1800) 3 Esp. 63; 6 R. R. 812; *Moons* v. *De Bernales*, (1856) 1 Russ. 301; *French* v. *French*, (1755) 1 Dick. 268. But the grant of probate by a foreign court of competent jurisdiction in the Probate Division in England raises a sufficient presumption of death for the English court to grant probate: see In the goods of *Spenceley*, [1892] P. 255; 61 L. J. P. D. & A. 133. And in an Irish court, where the question was whether a child had been born alive

though a probate cannot be granted until the Probate Division be satisfied of the genuineness of the will, and though, when granted, the title of the executor cannot, so long as the probate remains unrevoked (*l*), be impeached in a court of law by showing that the will was forged (*m*), still, if a party be indicted for forging the will, the probate will not be conclusive, if indeed it be *prima facie*, evidence in favour of the defendant (*n*). Neither would the production of a probate preclude a party from showing in a common-law court, either that the testator was insane at the time when he executed the will (*o*), or that his domicil was not then in England (*p*), provided the object of this evidence were not to impeach the title of the executor, in which case it would be inadmissible (*q*).

§ 1678. An exception to the above rule is recognised in cases where it appears on the face of the proceedings *in rem* that the fact on which the principal point depended, was itself put directly in issue, and was actually decided by the court. Here, if this fact be again controverted between the same parties, or persons claiming under them (*r*), whether in the same or in a different court, the judgment *in rem* will, almost universally (*s*), be conclusive upon the question. For instance, if, in a suit for administration, the sole question be, which of two parties is next-of-kin to the intestate, the sentence of the Probate Division, declaring "that, as far as appears by the evidence, the defendant has proved himself next-of-kin," and that administration be granted to him as such, will be conclusive evidence of the relative relationship of the parties in a subsequent action between them for distribution, instituted in the Chancery Division (*t*). The judgment in such a case would be equally conclusive on the parties, if the question of kindred had been determined by the court, not as a matter of fact, but as a point of law (*u*). So, the dismissal of a wife's petition for judicial separation charging cruelty, is a bar to a subsequent petition for a dissolution of

or dead, Sugden, L.C., held that a grant of letters of administration to its effects was a fact from which, in the absence of evidence to the contrary, he was bound to presume that the child was born alive; *Reilly* v. *Fitzgerald*, (1843) 6 Ir. Eq. R. 349.

(*l*) *Young* v. *Holloway*, [1895] P. 85.

(*m*) *Noel* v. *Wells*, 1 Lev. 235, 236.

(*n*) *R.* v. *Buttery*, (1818) R. & R. 342; *R.* v. *Gibson*, (1802) *id.* 343, n., overruling *R.* v. *Vincent*, (1722) 1 Str. 481.

(*o*) *Marriot* v. *Marriot*, (1726) 1 Str. 671.

(*p*) *Whicker* v. *Hume*, (1858) 7 H. L. C. 124, 156; 28 L. J. Ch. 396; 115 R. R. 70, per Ld. Cranworth; *Bradford* v. *Young*, (1884) 29 Ch. D. 656, 667.

(*q*) See cases in last two notes.

(*r*) See *Spencer* v. *Williams*, (1871) L. R. 2 P. & D. 230; 40 L. J. P. & M. 45.

(*s*) See *post*, § 1685.

(*t*) *Barrs* v. *Jackson*, (1845) 1 Phill. 582, 587, 588; 14 L. J. Ch. 433; 65 R. R. 457; *Bouchier* v. *Taylor*, (1776) 4 Bro. P. C. 708; *Doglioni* v. *Crispin*, (1866) L. R. 1 H. L. 301; 35 L. J. P. & M. 129.

(*u*) *Thomas* v. *Ketteriche*, (1749) 1 Ves. Sen. 333, recognised by Ld. Lyndhurst in *Barrs* v. *Jackson*, *supra*.

the marriage charging the same cruelty coupled with adultery (*v*); and the finding of a matrimonial court that a husband has been guilty of adultery, although the decree has been revoked on the ground of collusion and suppression of material facts, is conclusive in a subsequent suit by the husband against the wife (*x*). So, where, on appeal against an order of justices removing three paupers as the children of A. and B., the respondents relied upon a confirmed order for the removal of "A. and his wife B." from the respondent to the appellant parish, it was held that the appellants were conclusively estopped by this order, from showing that the children were illegitimate, in consequence of A. having committed bigamy in marrying B. (*y*). Indeed, it has been laid down broadly, with respect to orders of removal unappealed against, or confirmed on appeal, that they are not only evidence, but conclusive, as to all the facts mentioned in them, and which are necessary steps to the decision (*z*).

§ 1679. In the case of *R.* v. *Wye* (*a*), a curious question arose, in consequence of two conflicting judgments *in rem* having been pronounced. A pauper and his wife and their six children were removed by an order of justices, which was confirmed on appeal. Subsequently the Spiritual Court declared the marriage of these paupers void, on the ground of being incestuous (*b*). One of the children, born before the date of the order, but not named in it, was afterwards removed to the appellant parish, as the place of his father's settlement. The parish appealed, and relied on the decree of the Ecclesiastical Court; but the respondents urged, on the authority of *R.* v. *Woodchester* (*c*), that the former order for removing the parents as man and wife was conclusive evidence of the legitimacy of the present pauper. A case being reserved for the opinion of the Queen's Bench, that court decided in favour of the appellants, upon the ground that a new state of facts had arisen since the former order, the marriage, which at that time was only voidable, having since been declared void by competent authority.

§ 1680. Whether a judgment *in rem* is conclusive in a criminal proceeding is a question which admits of some doubt. In the *Duchess of Kingston's Case*, the judges expressed a decided opinion in the negative, urging, first, that it would be contrary to public policy, that the temporal courts, in the investigation of a criminal charge, should be

(*v*) *Finney* v. *Finney*, (1868) L. R. 1 P. & D. 483; 37 L. J. P. & M. 43.
(*x*) *Butler* v. *Butler*, [1894] P. 25; 63 L. J. P. 1.
(*y*) *R.* v. *Woodchester*, (1743) Burr. S. C. 191; *R.* v. *St. Mary, Lambeth*, (1796) 6 T. R. 615.
(*z*) *R.* v. *Wye*, (1838) 7 A. & E. 770; 7 L. J. M. C. 18; 45 R. R. 829; *R.* v. *Hartington Middle Quarter*, (1855) 4 E. & B. 780; 24 L. J. M. C. 98; 99 R. R. 746.
(*a*) (1838) 7 A. & E. 761.
(*b*) See now 5 & 6 W. 4, c. 54.
(*c*) (1743) Burr. S. C. 191.

bound by a decision, perhaps, of an ecclesiastical judge, addressed only to the conscience of the party, and founded, as it might be, on evidence inadmissible at common law; and next, that if such a decision were conclusive in favour of a prisoner, it would be equally binding against him; and, consequently, his life, liberty, property, and fame might depend upon the judgment of a court, which had no organs to discover whether he had committed a crime or not (*d*). On the other hand, it has been contended that this opinion of the judges, when taken apart from the reasons on which it is founded, is not entitled to much weight, it being merely an *obiter dictum* unnecessary for the decision of the points submitted to them; and then, in answer to the reasons, it is said that nothing can be more inconvenient or dangerous than a conflict of decisions between different courts; and that, if judgments *in rem* are not regarded as binding upon all courts alike, the most startling anomalies may occur.

§ 1681. The authorities reported in the books throw little light upon the subject. *R.* v. *Buttery* (*e*) is sometimes cited as confirming the opinion of the judges in the *Duchess of Kingston's Case*, but in fact it lends little, if any, support to that opinion; for the only point there determined was, that, if a party be indicted for forging a will, the mere production of the probate is not conclusive evidence of its validity; a doctrine which is unquestionably sound law, but which—as before stated (*f*)—would apply equally to a civil action, provided the object were not to dispute the title of the executor. On the other hand, where the inhabitants of a parish were indicted for not repairing a road, and an order of justices for dividing the road was put in on behalf of the prosecution, the court held that, as this order pursued the form given by the Act of 34 G. 3, c. 64, it was conclusive of the liability of the defendants to repair the portion of the road allotted to them, and they were consequently not allowed to prove that, in fact, no part of the road ever was within their parish (*g*). This case, however, is one of little authority on the present question, since it was determined, without any reference to the fact of its being an indictment, as coming within the principle of *Brittain* v. *Kinnaird* (*h*). It may be added, that in *R.* v. *Grundon* (*i*), which was an indictment for an assault upon an undergraduate of Queens' College, Cambridge, in turning him out of the college garden, the production of a sentence of expulsion was held to constitute a conclusive defence.

(*d*) (1776) 20 How. St. Tr. 540—543.
(*e*) (1818) R. & R. 342, cited *ante*, § 1677.
(*f*) *Ante*, § 1677.
(*g*) *R* v. *Hickling*, (1845) 7 Q. B. 880; 14 L. J. M. C. 177; 68 R. R. 582.
(*h*) (1819) 1 B. & B. 432.
(*i*) (1775) 1 Cowp. 315.

§ 1682. Judgments *inter partes*, or, as they are sometimes called, judgments *in personam*, are not—with one exception—admissible either for or against *strangers* in proof of the facts adjudicated (*k*). They are not admissible against them, because it is an obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger, and over the conduct of which he could, therefore, have exercised no control; or, to express the same sentiments in technical language, *res inter alios actæ alteri nocere non debent* (*l*); and they cannot be received in their favour even as against a party thereto, because it is thought, with very questionable propriety, that the previous rule might work injustice, unless its operation were mutual (*m*).

§ 1683. The exception just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a *public nature* (*n*), such as customs, (*o*), prescriptions (*p*), tolls (*q*), boundaries between parishes, counties, or manors (*r*), rights of ferry (*s*), liabilities to repair roads (*t*), or sea-walls (*u*), moduses (*v*), and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation—will also be received, and this, too, whether the parties in the second suit be those who litigated the first, or be utter strangers (*x*). The effect, however, of the adjudication, when admitted, will so far vary, that, if the parties be the same in both suits, they will be bound by the previous judgment; but if the litigants in the second suit be

(*k*) See *Shedden* v. *Att.-Gen. & Patrick*, (1861) 30 L. J. P. & M. 217, 227—231; 2 Sw. & Tr. 170, 179—181.

(*l*) B. N. P. 232.

(*m*) *Smith* v. *Rummens*, (1807) 1 Camp. 9; *Hathaway* v. *Barrow*, (1807) *id.* 151; *Blakemore* v. *Glamorganshire Canal Co.*, (1835) 2 Cr. M. & R. 139; Co. Lit. 352, a, cited and approved of in *Gaunt* v. *Wainman*, (1836) 3 Bing. N. C. 70; 5 L. J. C. P. 344; 43 R. R. 597; and in *Doe* v. *Errington*, (1840) 6 Bing. N. C. 83; 9 L. J. C. P. 9; 54 R. R. 730; *ante*, § 99. See, also, *Greely* v. *Smith*, (1846) 1 Wood. & M. 181. As to the admissibility of records as admissions by a party in favour of a stranger, see, *post*, § 1694.

(*n*) *Mulholland* v. *Killen*, (1874) I. R., 9 Eq. 471.

(*o*) *Reed* v. *Jackson*, (1801) 1 East, 357; 6 R. R. 283; *Berry* v. *Banner*, (1792) Pea. 156; 3 R. R. 674.

(*p*) *Id.*

(*q*) B. N. P. 233.

(*r*) *Brisco* v. *Lomax*, (1838) 8 A. & E. 198; 7 L. J. Q. B. 148; 47 R. R. 549; *Evans* v. *Rees*, (1839) 10 A. & E. 151, 153; 50 R. R. 366.

(*s*) *Pim* v. *Curell*, (1840) 6 M. & W. 234; 55 R. R. 600; *Hemphill* v. *M'Kenna*, (1845) 8 Ir. L. R. 43.

(*t*) *R.* v. *St. Pancras*, (1794) Peake 220; *R.* v. *Haughton*, (1853) 1 E. & B. 501; 22 L. J. M. C. 89; 93 R. R. 264.

(*u*) *R.* v. *Leigh*, (1840) 10 A. & E. 398; 50 R. R. 463.

(*v*) *Croughton* v. *Blake*, (1843) 12 M. & W. 205, 209; 13 L. J. Ex. 78; 67 R. R. 310.

(*x*) Cases cited in last nine notes; *ante*, §§ 624—627.

strangers to the parties in the first, the judgment, though admissible, will not be conclusive (*y*).

§ 1684. Though a judgment *inter partes* is thus seldom admissible, and never conclusive, evidence of the facts adjudicated, either for or against strangers, it is always—with one exception which will be explained in the next section—admissible for or against parties or privies, where the same subject-matter is a second time in controversy between the same parties or persons claiming under them (*z*), and this, whether it be a judgment in a contested case or a judgment by consent or by default (*a*). In no case will it be regarded as quite conclusive of the rights in dispute, unless it be pleaded as matter of estoppel (*b*); but even if not so pleaded, it will furnish highly cogent evidence, which cannot be disregarded by a jury, excepting upon good and substantial grounds (*c*). The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom, that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.

§ 1685. The exception referred to in the last preceding section is recognised in the very rare event of two suits being tried on different principles so far as relates to the admissibility of evidence. Here the judgment obtained in the first suit, whether it be a judgment *inter partes*, or a judgment *in rem*, cannot be received as any evidence of the facts adjudicated thereby, even though the same facts be again in dispute. For instance, in a suit by a husband for dissolution of marriage on the ground of his wife's adultery, the wife could not, prior to August 9, 1869 (*d*), in support of her answer charging cruelty and desertion, rely on a decree of judicial separation which she had already obtained on these grounds, after having been examined herself as a witness; for, as in the second suit her testimony was, under the old law, inadmissible, to admit the decree would in effect have admitted her evidence at second hand, and thus would have done indirectly what the law forbade to be directly done (*e*).

(*y*) *Reed* v. *Jackson*, *supra*; *Croughton* v. *Blake*, *supra*.

(*z*) *Duchess of Kingston's Case*, (1776) 20 How. St. Tr. 538; B. N. P. 232; *Ferrers* v. *Arden*, (1599) 6 Rep. 7; *Sopwith* v. *Sopwith*, (1861) 30 L. J. P. & M. 131; 2 Sw. & Tr. 160; *Houston* v. *Marquis of Sligo*, (1885) 29 Ch. D. 448.

(*a*) *In re South American and Mexican Co.*, [1895] 1 Ch. 37; 64 L. J. Ch. 189; *Joint Committee of the River Ribble* v. *the Croston Urban Council*, [1897] 1 Q. B. 251; 66 L. J. Q. B. 384.

(*b*) *Ante*, §§ 91, 1673; *Joly* v. *Swift*, (1847) 11 Ir. Eq. R. 410; *Nowlan* v. *Gibson*, (1847) 12 Ir. L. R. 5, 8—12.

(*c*) *Outram* v. *Morewood*, (1803) 3 East, 365; 7 R. R. 473; *R.* v. *Blakemore*, (1852) 2 Den. C. C. 410.

(*d*) When the Act 32 & 33 V. c. 68, passed. See *ante*, § 1355.

(*e*) *Stoate* v. *Stoate*, (1861) 30 L. J. P. & M. 102; 2 Sw. & Tr. 223; *Bancroft* v.

§ 1685A. A case which may be classed as an exception to the general rule that a judgment is conclusive *inter partes* upon the facts decided is that of a petition to revoke a patent. In such a case it appears that the respondent will not be estopped from alleging the validity of the patent, although it has been held to be invalid in a previous suit in which the petitioner and respondent were parties, the reason apparently being that "a petition to revoke a patent by whomsoever presented is a petition on behalf of the public, and it is not personal to the petitioner," and in a legal point of view it is a mere accident that the petitioner was a party to the former litigation (*f*).

§ 1686. Under the term *parties* in this connection, the law includes all those who are *individually named in the record*, and who are consequently entitled to prosecute or defend the cause, to adduce testimony, to cross-examine witnesses called on the other side, and to appeal from the judgment, should an appeal be allowable by law (*g*). Thus, where the heir-at-law of a testator has been a defendant as one of the testator's next-of-kin in a probate action to establish the will, he cannot in a subsequent proceeding dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the original action as heir-at-law (*h*). Even a party, who has been sued as the public officer of a bank, has been held to be amenable to this rule, though it was urged in his favour that the judgment relied on had been obtained against him *en autre droit* (*i*). However, a *prochein amy* is not such a party, being considered simply as a person appointed by the court to look after the interests of the infant or person of unsound mind, and to manage the suit for him (*k*); but the infant himself is a party, and will, consequently, be bound by the judgment in any action brought in his name by his *prochein amy* duly appointed, even though the suit may have been instituted and conducted without his authority or knowledge (*l*). Neither will the law, in such a case, recognise any distinction between infants of tender and of mature years; and, therefore, where the wife of a minor committed adultery, whilst her husband was abroad in the East Indies, and the father, having procured himself to be appointed *prochein amy*, commenced an action for criminal conversation in his son's name, but without his

Bancroft & Rumney, (1865) 34 L. J. P. & M. 14. But see *Sopwith* v. *Sopwith*, *supra*, where the Judge Ordinary, while verbally recognising the exception as above stated, practically set it at nought. See, also, *Bland* v. *Bland*, (1866) 35 L. J. P. & M. 104.

(*f*) *In re Deely's Patent*, [1895] 1 Ch. 687; 64 L. J. Ch. 480.

(*g*) *Duch. of Kingston's Case*, (1776) 20 How. St. Tr. 538, n.

(*h*) *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746; 68 L. J. Q. B. 270.

(*i*) *Spencer* v. *Thompson*, (1856) 6 Ir. C. L. R. 537, 566.

(*k*) *Sinclair* v. *Sinclair*, (1845) 13 M. & W. 640; 14 L. J. Ex. 109; *Vivian* v. *Little*, (1883) 11 Q. B. D. 370; 52 L. J. Q. B. 771.

(*l*) *Morgan* v. *Thorpe*, (1841) 7 M. & W. 400; 10 L. J. Ex. 125.

knowledge, the court held that the son would be bound by the judgment in this action (*m*). But if a person *sui juris* be made a party to a suit without his knowledge or consent, he will not be bound by the proceedings; and therefore, if a plaintiff, instead of serving a defendant with process, thinks fit to accept the appearance of an unauthorised solicitor for him, he runs the risk of having the judgment subsequently set aside as irregular, with costs (*n*). So, where a debtor, on action brought, paid his debt to the solicitor who was suing him in the name, but without the authority, of the creditor, it was held that this payment did not discharge him (*o*).

§ 1687. Whether the term *parties* will also include persons not named in the record, but in *whose immediate and individual behalf the action has been brought or defended*, may admit of some doubt. The case of *Kinnersley* v. *Orpe* (*p*) is said to have decided this point in the affirmative (*q*); but this, it is submitted, is a mistake. That was an action brought to recover penalties from a servant of one Cotton for fishing in the plaintiff's fishery. The plaintiff, in support of his right to the fishery, produced no other proof than the record of a verdict and judgment recovered by him against another servant of Cotton, in a former action for a trespass committed on the same fishery. In both actions the servants justified as acting by the orders of their master, who claimed a right to the fishery in question. The judge at Nisi Prius, considering Cotton as the real defendant in both actions, held the record to be conclusive, and directed the jury to find for the plaintiff, which they did. A new trial was, however, subsequently granted, the court intimating that the record, though admissible evidence, was not conclusive. As no reasons are given for this opinion, the case would be one of little authority, even had it never been questioned; but its value becomes much less, when we find Lord Ellenborough, in his well-considered judgment in *Outram* v. *Morewood* (*r*), expressing his astonishment that an estoppel in such a case could ever have been supposed possible, and then, in the shape of a doubt, intimating a tolerably clear opinion that the record was wholly inadmissible, as the defendant was no party to the former action.

§ 1688. However, thus much has been established, that, under the old law relative to actions of ejectment, the lessor of the plaintiff

(*m*) *Id.*

(*n*) *Bayley* v. *Buckland*, (1847) 1 Ex. 1; 16 L. J. Ex. 204; 74 R. R. 573.

(*o*) *Robson* v. *Eaton*, (1785) 1 T. R. 62.

(*p*) Thus, in *Simpson* v. *Pickering*, (1834) 1 Cr. M. & R. 529; 4 L. J. Ex. 21, Alderson, B., observes as an *obiter dictum*, "*Kinnersley* v. *Orpe* shows that the verdict may be given in evidence where the parties are really the same." See, also, 2 Ph. Ev. 7; and *Doe* v. *Earl of Derby*, (1834) 1 A. & E. 791; 3 L. J. K. B. 191; 40 R. R. 423.

(*q*) (1780) 2 Doug. 517.

(*r*) (1803) 3 East, 366; 7 R. R. 473. See *Case* v. *Reeve*, (1817) 14 Johns. 81, 82.

and the tenant in possession must be regarded as having been the real parties; and, consequently, any judgment in such an action, whether upon verdict, or by default against the casual ejector, would be cogent, if not conclusive, evidence in any subsequent action to recover land between the same parties, provided it were brought respecting the same property (*s*). So, the landlord, or other person, in whose right a defendant in replevin has made cognisance, has been held to be a party to that suit (*t*); and a person not a party to an action or summons, but fully cognisant of the proceedings and who could have intervened therein, who stands by and deliberately takes the benefit of a decision on the construction of a will under which a particular fund is distributed, has been held to be estopped by his conduct, where the circumstances are identical, from re-opening any of the questions covered by the former judgment by means of a fresh action or summons relating to another fund under the same will, although claiming in respect of a different interest (*u*). A similar rule prevails in the Probate Courts (*v*). It would certainly be convenient and reasonable if the rule,—in conformity with that which governs admissions (*x*),—were extended to all persons who were *substantially* parties to the former action. Indeed, it is highly probable, notwithstanding the absence of direct authority, that the courts would now determine in favour of such extension, and the more so, as beyond all doubt, the rule applies to every person who claims under the original parties, or in privity with them.

§ 1689 (*y*). It has already been shown, that the term *privity* denotes mutual or successive relationship to the same rights of property; and the reason why persons standing in this relation to the litigant can rely upon, and are bound by, the proceedings to which he has been a party, is, that they are identified with him in interest (*z*). Hence all privies, whether in blood, in estate, or in law, are estopped themselves, and can estop others, from litigating that, which would be conclusive either against or in favour of him with whom they are

(*s*) *Doe* v. *Huddart*, (1835) 2 Cr. M. & R. 316; *Doe* v. *Seaton*, (1835) 2 Cr. M. & R. 728, 732; *Wright* v. *Doe* d. *Tatham*, (1834) 1 A. & E. 19; 3 L. J. Ex. 366; 40 R. R. 226; *Doe* v. *Wellsman*, (1848) 2 Ex. 368; 18 L. J. Ex. 277; *Armstrong* v. *Norton*, (1839) 2 Ir. L. R. 96; *Aslin* v. *Parkin*, (1758) 2 Burr. 665; *Nowlan* v. *Gibson*, (1847) 12 Ir. L. R. 5, 10—14; *Litchfield* v. *Ready*, (1850) 5 Ex. 939; 20 L. J. Ex. 51; 82 R. R. 932; *Matthew* v. *Osborne*, (1853) 13 C. B. 919; 22 L. J. C. B. 241; 93 R. R. 808; *Doe* v. *Challis*, (1851) 17 Q. B. 166; 20 L. J. Q. B. 113. See *post*, § 1696.

(*t*) *Hancock* v. *Welsh*, (1816) 1 Stark. 347.

(*u*) *In re Lart*, *Wilkinson* v. *Blades*, [1896] 2 Ch. 788; 65 L. J. Ch. 846.

(*v*) *Young* v. *Holloway*, [1895] P. 85; 64 L. J. P. 55; *Mohan* v. *Broghton*, [1899] P. 211; [1900] P. 56; 69 L. J. P. 20.

(*x*) *Ante*, § 756.

(*y*) Gr. Ev. in part, as to first eight lines.

(*z*) *Ante*, §§ 90, 787.

in privity (*a*). Thus, where a general right has been contested, and established against a representative class, persons included in the class represented, though not actual parties to the suit, will be still bound by the decision (*b*). So, a verdict and judgment for or against the ancestor may be pleaded in bar, or will furnish cogent evidence, for or against the heir, the tenant in dower, the tenant by the curtesy, the legatee, the devisee, or any other person claiming under the ancestor (*c*). So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession (*d*). A judgment of ouster in a *quo warranto*, against the incumbent of an office, is conclusive against those who derive their title to office under him (*e*). The conviction, too, of a former owner of lands on an indictment for non-repair of a road *ratione tenuræ*, will be cogent, if not conclusive, evidence of liability to repair, as against a subsequent purchaser of the same lands (*f*). So, an executor or administrator will be bound by a verdict recovered against the testator or intestate (*g*); a trustee in bankruptcy by a judgment against the bankrupt (*h*); a husband and wife will be bound by a verdict recovered against the wife before her marriage (*i*); and the same rule will apply to all grantees, mortgagees, and assignees, provided their title has accrued since the judgment was pronounced (*k*).

§ 1690. Where a man brought an action against several persons for diverting water from his works, and had judgment; and after-

(*a*) *Ante*, § 90.

(*b*) *Commissioner of Sewers of London* v. *Gellatly*, (1876) 3 Ch. D. 610; 45 L. J. Ch. 788.

(*c*) *Lock* v. *Norborne*, (1687) 3 Mod. 141; *Outram* v. *Morewood*, (1803) 3 East, 346; 7 R. R. 473; *Whittaker* v. *Jackson*, (1864) 33 L. J. Ex. 181; 2 H. & C. 926; 133 R. R. 862.

(*d*) *Pyke* v. *Crouch*, (1696) 1 Ld. Ray. 730; *Doe* v. *Tyler*, (1830) 6 Bing. 390.

(*e*) *R.* v. *Mayor of York*, (1792) 5 T. R. 66, 72, 76; *R.* v. *Hebden*, (1739) 2 Str. 1109.

(*f*) *R.* v. *Blakemore*, (1852) 2 Den. 410. A purchaser of land, however, is not estopped, as being privy in estate, by a judgment recovered against the vendor in an action commenced after the purchase: *Mercantile Trust Co.* v. *River Plate Co.*, [1894] 1 Ch. 578; 61 L. J. Ch. 473.

(*g*) *R.* v. *Hebden*, (1738) Andr. 389.

(*h*) *In re Tollemache, Ex parte Anderson*, (1885) 14 Q. B. D. 606; 54 L. J. Q. B. 283.

(*i*) *Outram* v. *Morewood*, *supra*. But see 33 & 34 V. c. 93, s. 12; and 37 & 38 V. c. 50, ss. 1 & 2. The former protects the husband from liability "for the debts of his wife contracted before marriage" (see *Conlon* v. *Moore*, (1875) I. R. 9 C. L. 190), and renders the wife responsible for such debts, provided the parties were married between the 9th of August, 1870, and the 30th of July, 1874, the latter, with respect to all marriages contracted since the last-named date, has again imposed on the husband a limited liability, in the event of his wife having brought him any fortune. See, also, now 45 & 46 V. c. 75, ss. 14, 15, as to the law with respect to parties married since 31st Dec., 1882.

(*k*) *Doe* v. *Earl of Derby*, (1834) 1 A. & E. 790; 3 L. J. K. B. 191; 40 R. R. 423; *Doe* v. *Webber*, (1834) 1 A. & E. 119; 3 L. J. K. B. 148; 40 R. R. 268; *Adams* v. *Barnes*, (1821) 17 Mass. 365.

wards he and another sued the same defendants for a similar injury to the same works; the former judgment was held to be cogent evidence for the plaintiffs, their privity in estate with the former plaintiff being presumed by the court from the fact that they were in possession of the property (*l*).

§ 1691. In all the instances of privity above given, the privy has claimed, or been liable, under or through the original party; but the same rules of law apply, where two or more persons are subject to a *joint* or *concurrent* liability. For instance, if one be sued alone upon a joint note, debt, or tort, the judgment against him, even without satisfaction, may be pleaded and proved in bar of a second suit for the same course of action (*m*), whether it be brought against the other debtor or wrong-doer, or against the joint debtors or wrong-doers; because in these cases, the original cause of action has been changed into matter of record, which is of a higher nature, and the inferior remedy is thus merged in the higher (*n*); for, if a party, having joint remedies against several persons in respect of the same cause of action and who has recovered judgment against one was not estopped from proceeding against the others, he might recover damages twice over for the same cause of action, which would be repugnant to natural justice (*o*). The rule, however, that a judgment, although unsatisfied, obtained against one of two joint debtors or joint tort-feasors is a bar to an action against the other, is confined to cases where the cause of action is the same; thus, an unsatisfied judgment against one joint contractor, on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract (*p*). A judgment against one of several debtors on a *joint and several* debt is a bar to an action against the others only if the

(*l*) *Blakemore* v. *Glamorgan Canal Co.*, (1835) 2 Cr. M. & R. 133, 139; *Strutt* v. *Bovingdon*, (1803) 5 Esp. 58, 59; 8 R. R. 834.

(*m*) See *Brinsmead* v. *Harrison*, (1817) L. R. 7 C. P. 547; 41 L. J. C. P. 190.

(*n*) *King* v. *Hoare*, (1844) 13 M. & W. 494, 504; 14 L. J. Ex. 29; 67 R. R. 694; *Kendall* v. *Hamilton*, (1879) 4 App. Cas. 504; 48 L. J. C. P. 705; *Lechmere* v. *Fletcher*, (1833) 1 Cr. & M. 634; 2 L. J. Ex. 219; 38 R. R. 688; *Brown* v. *Wootton*, (1606) Yelv. 67; Cro. Jac. 73; M. 762, S. C.; *Ward* v. *Johnson*, (1807) 13 Mass. 148. These cases overrule a *dictum* of Ld. Tenterden in *Watters* v. *Smith*, (1831) 2 B. & Ad. 892; 1 L. J. K. B. 31; 36 R. R. 785. This is so even if judgment is obtained against one of two joint debtors upon an admission by him in an action in which the joint debtors are sued together: *McLeod* v. *Power*, [1898] 2 Ch. 295; 67 L. J. Ch. 551; if, however, the plaintiff obtains judgment under Ord. XIV., or by default, against one of several joint debtors sued together, the Rules of Court provide that he may go on against the other defendant or defendants. See Ord. XIV., r. 5; Ord. XIII., rr. 4, 7; *McLeod* v. *Power*, *supra*; and *Weall* v. *James*, (1893) 68 L. T. 515.

(*o*) *Bird* v. *Randall*, (1762) 3 Burr. 1345, 1353; recognised in *Cooper* v. *Shepherd*, (1846) 3 C. B. 272; 15 L. J. C. P. 237; 71 R. R. 349; *King* v. *Hoare*, *supra*; *Lechmere* v. *Fletcher*, *supra*; *U. S.* v. *Cushman*, (1836) 2 Summ. 426, 437—441; *Farwell* v. *Hilliard*, (1825) 3 New Hamp. 318. See *Godson* v. *Smith*, (1818) 2 Moore, 157.

(*p*) *Wegg-Prosser* v. *Evans*, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1.

judgment has been satisfied (*q*). Although a judgment obtained against one of several joint debtors is thus a conclusive defence in an action against the others, a judgment obtained by one of several joint debtors in an action brought against him alone is no defence to a subsequent action against the other joint debtors in respect of the same cause of action unless it appears that the judgment was obtained on a ground which operates as a discharge of all (*r*).

§ 1692. Upon a somewhat similar principle, any payment made by, or execution levied upon, a garnishee under any proceeding for the attachment of debts owing or accruing from him to a judgment debtor is rendered, by the Rules of the Supreme Court, a valid discharge to the garnishee as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside or the judgment reversed (*s*).

§ 1693. In conformity with the rule, which rejects judgments *inter partes* as evidence either for or against strangers to prove the facts adjudicated, it has been determined that a judgment in a criminal prosecution,—unless admissible as evidence in the nature of reputation (*t*), or, taken in conjunction with the prosecution, as an act of ownership (*u*),—cannot be received in a civil action to establish the truth of the facts on which it was rendered (*v*); and that a judgment in a civil action, or an award (*x*), cannot be given in evidence for such a purpose in a criminal prosecution (*y*). So, the record of the conviction of a principal cannot be received as any proof of his

(*q*) *King* v. *Hoare*, *supra*.

(*r*) *Phillips* v. *Ward*, (1863) 2 H. & C. 717; 33 L. J. Ex. 7; 133 R. R. 758. When there is no joint contract or relation of principal and agent, an unsatisfied judgment against one person for the price of goods sold is not a bar to a subsequent action against another person for the price of the same goods : *Isaacs & Sons, Lim.* v. *Salbstein*, [1916] 2 K. B. 139; 85 L. J. K. B. 1433.

(*s*) Ord. XLV., r. 7. See County Court rule, Ord. XXVI., r. 11; and *Randall* v. *Lithgow*, (1884) 12 Q. B. D. 525; 53 L. J. Q. B. 518. See, also, 17 & 18 V. c. 125, s. 65; which section, although repealed generally, is still applicable to the Mayor's Court by virtue of an Order in Council.

(*t*) See *Petrie* v. *Nuttall*, (1856) 11 Ex. 569; 25 L. J. Ex. 200; 105 R. R. 651; *ante*, § 624.

(*u*) *Brew* v. *Haren*, (1877) I. R. 11 C. L. 198.

(*v*) *Smith* v. *Rummens*, (1807) 1 Camp. 9; *Hathaway* v. *Barrow*, (1807) *id.* 151; both which cases are explained by Parke, B., in 2 Cr. M. & R. 139; *Justice* v. *Gosling*, (1852) 12 C. B. 39; 21 L. J. C. P. 94; 92 R. R. 605; *Jones* v. *White*, (1718) 1 Str. 68; B. N. P. 233; *Hillyard* v *Grantham*, cited by Ld. Hardwicke in *Brownsword* v. *Edwards*, (1750) 2 Ves. Sen. 246; *Gibson* v. *M'Carty*, (1736) Cas. t. Hardw. 311; *Helsham* v. *Blackwood*, (1851) 11 C. B. 111; 20 L. J. C. P. 187; 87 R. R. 596; *Wilkinson* v. *Gordon*, (1824) 2 Add. 152; *Jameson* v. *Leitch*, (1842) Milw., Ecc. Ir. R. 690. See, also, 24 & 25 V. c. 96, s. 86, cited *ante*, § 1455.

(*x*) *R.* v. *Fontaine Moreau*, (1848) 11 Q. B. 1028; 17 L. J. Q. B. 187.

(*y*) See *R.* v. *Duchess of Kingston*, (1776) 20 How. St. Tr. 471, 485; *Acta facta in causâ civili non probant in causâ criminali*. Masc., de Prob., Concl. 34.

guilt on the trial of a subsequent indictment against the accessory (*z*). However, where a prisoner was indicted for the substantive offence of receiving stolen goods, and a witness for the Crown, after confessing that he was himself the thief, admitted on cross-examination that he had been tried and acquitted of the theft, the Irish judges held, that the acquittal of the principal, though not conclusive evidence of his innocence, was a fact which it was right to leave to the jury, together with the fact of his subsequent confession in court (*a*). Again, a verdict for or against a tenant for life, will not be evidence for or against the reversioner, because the reversioner does not claim through the tenant for life, but enjoys an independent title (*b*). So, a judgment obtained by or against a lessee, cannot, it is submitted,—notwithstanding some authorities to the contrary (*c*),—be made available in a subsequent action by or against the lessor (*d*).

§ 1694 (*e*). It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a *solemn admission* by such party in a judicial proceeding, with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is therefore to be treated according to the principles governing admissions, to which class of evidence it properly belongs (*f*). Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had had the plaintiff's goods (*g*). So, a record of judgment in a criminal case, upon a plea of guilty, is admissible in a civil action against the party, as a solemn judicial confession of the fact (*h*).

(*z*) *R.* v. *Turner*, (1832) 1 Moo. C. C. 347; *R.* v. *Ratcliffe*, (1832) 1 Lewin C. C. 122; *Keable* v. *Payne*, (1838) 8 A. & E. 560; 7 L J. Q. B. 218; *R.* v. *Smith*, (1783) 1 Lea. 288. These cases do not directly establish the proposition in the text; but its soundness is clear on principle, unless a conviction be a judgment *in rem*, which it is submitted it is not.

(*a*) *R.* v. *M'Cue*, (1831) Jebb, C. C. 120.

(*b*) B. N. P. 232. See *ante*, §§ 757, 758.

(*c*) Com. Dig., Ev. A. 5; 2 Ph. Ev. 11. The passage in Comyn seems to apply to the old action of *ejectione firmæ*.

(*d*) *Wenman* v. *Mackenzie*, (1855) 5 E. & B. 447; 25 L. J. Q. B. 44; 103 R. R. 563; *Rees* v. *Walters*, (1838) 3 M. & W. 527; 7 L. J. Ex. 138; *Rushworth* v. *Countess of Pembroke*, (1668) Hardr. 472. See *ante*, § 789.

(*e*) Gr. Ev. § 527, a, in part.

(*f*) *Ante*, §§ 772, 783, 821.

(*g*) *Tiley* v. *Cowling*, (1701) 1 Ld. Raym. 744; *Robinson* v. *Swett*, (1825) 3 Greenl. 316.

(*h*) *Anon.*, (1808) per Wood, B., cited 2 Ph. Ev. 25; *R.* v. *Fontaine Moreau*, *supra*; *Bradley* v. *Bradley*, (1834) 2 Fairf. 367. As to the admissibility as against the

§ 1695. In order that a judgment should bind parties and privies, it must have *directly decided the point* which is *in issue* in the *second action* (*i*); and therefore, whenever it is pleaded by way of estoppel, or is offered in evidence, the opposite party is always at liberty to deny on the record, or at the trial, that it has settled the rights of the parties as to the same cause of action, which is now in controversy; and the question of identity thus raised, must be determined by the Judge, or, if the facts are disputed, by the jury upon the evidence adduced. For the purpose of determining it, not only may the pleading in the former action be looked at (*k*), but the actual words of the judgment may be proved by a shorthand note, verified by the affidavit (*l*), either of the shorthand writer who took it, or, where such person is dead, of someone employed in the suit who can verify the correctness of the note (*m*). The due determination of this question will require a careful examination of the issues raised in the two actions; but it is not necessary that the actions should be in the same form, provided the facts in issue are really the same (*n*).

§ 1696 (*o*). For instance, if one wrongfully take another's horse and sell it, applying the money to his own use, a recovery in an action of trespass by the owner for the taking, would be a bar to a subsequent action for the money received, or for the value, the cause of action being proved to be the same (*p*). So, if two wrong-doers were jointly to convert goods to their own use by selling them, a judgment in trover recovered against one would constitute a bar to a subsequent action against the other for money had and received, even though it were capable of proof, that the proceeds of the sale had exceeded the amount of the damages awarded in the first action (*q*).

party himself or his legal representatives of a conviction on plea of not guilty, see *In the goods of Crippen*, *ante*, § 1674.

(*i*) *Ricardo* v. *Garcias*, (1845) 12 Cl. & F. 368; 65 R. R. 580; *Bainbrigge* v. *Baddeley*, (1847) 2 Phill. 705, 709, 710; *Toulmin* v. *Copland*, (1848) *id.* 711; *Hunter* v. *Stewart*, (1861) 4 De Gex, F. & J. 168, 176—178; 31 L. J. Ch. 346; 135 R. R. 72; *Langmead* v. *Maple*, (1865) 18 C. B. (N.S.) 255; 144 R. R. 482; *Moss* v. *Anglo-Egyptian Navig. Co.*, (1865) L. R. 1 Ch. 108; 35 L. J. Ch. 179; *Dolphin* v. *Aylward*, (1864) 15 Ir. Ch. R. 583; *Flitters* v. *Allfrey*, (1874) L. R. 10 C. P. 29; 44 L. J. C. P. 79.

(*k*) *Hunter* v. *Stewart*, *supra*.

(*l*) *Houston* v. *Marquis of Sligo*, (1885) 29 Ch. D. 448.

(*m*) *De Mora* v. *Concha*, (1885) 29 Ch. D. 281; 54 L. J. Ch. 532.

(*n*) *Krishna Behari Roy* v. *Brojeswari Chowdranee*, (1875) L. R. 2 Ind. App. 283. See, also, *Symons* v. *Rees*, (1876) 1 Ex. D. 416; *Priestman* v. *Thomas*, (1884) 9 P. D. 70; 53 L. J. P. 58.

(*o*) Gr. Ev. § 532, as to first five lines.

(*p*) 17 Pick. 13, per Putnam, J.; *Young* v. *Black*, (1813) 7 Cranch, 565; *Livermore* v. *Herschell*, (1825) 3 Pick. 33. Whether parol evidence would be admissible in such case to prove that the damages awarded in trespass were given merely for the tortious taking, without including the value of the goods, to which no evidence had been offered; *quære*, and see *Loomis* v. *Green*, (1831) 7 Greenl. 386.

(*q*) *Buckland* v. *Johnson*, (1854) 23 L. J. C. P. 204; 15 C. B. 145; 100 R. R. 280.

So, a verdict for the defendant in trover, on a plea denying the plaintiff's title to the goods, is a bar to an action for the money arising from the sale of them, because in both these actions the same question of property must necessarily arise (*r*). Again, the recovery of judgment in replevin is a bar to an action of trespass in respect of the same taking of the same goods; because, although the damages actually recovered in replevin are usually assessed at the cost of the replevin bond, no law exists to deprive the plaintiff of the right to recover special damages in that form of action (*s*). So, where a farmer, on being sued in the County Court for discharging his servant before the termination of the hiring without reasonable cause, had obtained judgment, this judgment was held to be a bar to a subsequent summons before justices against the master to recover the servant's wages; though it was urged in that case with much force, that the jurisdiction of the two courts was totally distinct, and that the claim made in the one was different from that preferred in the other (*t*). An order taken by consent in a Chancery action for the delivery up of certain shares is a bar to a subsequent action for damages for their detention, for the damages might have been obtained in the Chancery action (*u*). In an action for mesne profits, where the defendant in his statement relies on the non-possession of the plaintiff, the latter may reply, by way of estoppel, a judgment for the recovery of land in his favour, whether it be by verdict or by default, and whether it has been followed or not by the issue and execution of a writ of possession (*v*). A finding in previous proceedings in the County Court that a tenancy is yearly, estops every party to such proceedings from subsequently asserting, in an action in the High Court, that such tenancy is weekly (*x*). So a verdict for the defendant in replevin, where to an avowry for rent the plaintiff had denied the tenancy, has been held to conclude the plaintiff, when subsequently sued by the party under whom defendant had made cognisance, for the rent which had accrued at the time of the distress (*y*). A finding upon an interpleader issue in a county court that certain royalties on letters patent taken out by an undischarged bankrupt are personal earnings of the bankrupt prevents the trustee in bankruptcy from

(*r*) *Hitchin* v. *Campbell*, (1772) 2 W. Bl. 827, 831, 832.

(*s*) *Gibbs* v. *Cruikshank*, (1873) L. R. 8 C. P. 451; 42 L. J. C. P. 273.

(*t*) *Routledge* v. *Hislop*, (1860) 29 L. J. M. C. 90; 2 E. & E. 549; 119 R. R. 841. But see *Hindley* v. *Haslam*, (1878) 3 Q. B. D. 481.

(*u*) *Serra* v. *Noel*, (1885) 15 Q. B. D. 549.

(*v*) *Wilkinson* v. *Kirby*, (1854) 23 L. J. C. P. 224; 15 C. B. 430; 100 R. R. 420. But see *Pearse* v. *Coaker*, (1869) L. R. 4 Ex. 92; 38 L. J. Ex. 82; and *Kenna* v. *Nugent*, (1873) I. R. 7 C. L. 464, where the Irish Ex. Ch. held that a judgment by default in ejectment was not an estoppel, and therefore, in an action for mesne profits, was not conclusive as to the time at which the plaintiff's title accrued. Qu., therefore, as to the law stated in the text. See, also, *ante*, § 1688.

(*x*) *Flitters* v. *Allfrey*, (1874) L. R. 10 C. P. 29; 44 L. J. C. P. 73.

(*y*) *Hancock* v. *Welsh*, (1816) 1 Stark. 347.

asserting in subsequent proceedings in the High Court that royalties that subsequently became due are not the bankrupt's personal earnings (*z*); and where,—prior to the 10th of August, 1854, when the laws relating to usury were repealed (*a*),—the defendant pleaded usury to an action on a bond, a verdict of acquittal in an action for penalties for usury on the same bond, between the same parties, was held to be evidence for the plaintiff (*b*). A party who had either obtained a decree for a divorce *a mensa et thoro* in the Ecclesiastical Court, or whose suit for that purpose had been dismissed, could not afterwards maintain a fresh suit for judicial separation on the same grounds (*c*).

§ 1697. But, on the other hand, the recovery of damages for injury to plaintiff's carriage through defendant's negligent driving, will not bar any second action claiming compensation for personal injuries caused by the same accident; for, although the plaintiff, in such a case, may have had an opportunity of recovering in the first action the damages claimed in the second, he was not obliged to avail himself of it, but he was entitled in strict law, to discriminate between the damage done to his property, and that done to his person, and to treat each injury as a separate and distinct cause of action (*d*). So, the prior recovery of damages in an action for false imprisonment, cannot be pleaded in bar to a subsequent action for malicious prosecution, even though the jury on the first trial may have been misdirected to take into their consideration the malicious conduct of the defendant (*e*). Neither will a judgment recovered by a widow seeking compensation, under Lord Campbell's Act (*f*), for the death of her husband through the negligence of the defendants, be a bar to a subsequent action brought by her, as his administratrix, to recover damages from the same defendants for an injury caused by the same accident to his personal property (*g*). Nor, in a case of collision at sea, will a proceeding *in rem* in the Admiralty Division be any bar to a proceeding *in personam* in the King's Bench Division (*h*). A verdict, too, for the defendant in an action for detention of goods

(*z*) *In re Graydon*, [1896] 1 Q. B. 417; 65 L. J. Q. B. 328.

(*a*) 17 & 18 V. c. 90.

(*b*) *Cleve* v. *Powel*, (1832) 1 M. & Rob. 228. For other examples, see *Whittaker* v. *Jackson*, (1864) 33 L. J. Ex. 181; 2 H. & C. 926; 133 R. R. 862; *Newington* v. *Levy*, (1870) L. R. 6 C. P. 180; 40 L. J. C. P. 29.

(*c*) *Ciocci* v. *Ciocci*, (1860) 29 L. J. P. & M. 60. See *Green* v. *Green*, (1873) L. R. 3 P. & D. 121; 43 L. J. P. & M. 6; and *Evans* v. *Evans*, (1858) 27 L. J. P. & M. 57.

(*d*) *Brunsden* v. *Humphrey*, (1884) 14 Q. B. D. 141; 53 L. J. Q. B. 476.

(*e*) *Guest* v. *Warren*, (1854) 23 L. J. Ex. 121; 9 Ex. 379; 96 R. R. 756.

(*f*) 9 & 10 V. c. 93; 27 & 28 V. c. 95.

(*g*) *Barnett* v. *Lucas*, (1872) I. R. 6 C. L. 247.

(*h*) *Nelson* v. *Couch*, (1863) 15 C. B. (N.S.) 99; 137 R. R. 413; *The Bengal*, (1859) Sw. Adm. 468; *The John and Mary*, (1859) *id.* 471; *Harmer* v. *Bell*, (1851) 7 Moore P. C. 267; 83 R. R. 43.

on a statement of defence setting up an authorised sale, will not prevent him from being liable to the plaintiff for the proceeds of the sale in an action for money had and received; because such a verdict must have been given on the express ground, that the defendant had sold the goods in question on the authority of the plaintiff (*i*). Again, if an action were brought for obstructing a watercourse, and the plaintiff were to obtain a verdict on a defence denying the obstruction, this would not preclude the defendant from disputing the plaintiff's right to the watercourse, should he bring a second action for a subsequent obstruction (*k*). So, if a tenant, when sued for rent, were to allow judgment to go by default, he would not thereby be estopped, in an action for subsequent rent, from pleading any justification, though such statement of defence would have barred the former claim, had it been pleaded on the first occasion (*l*).

§ 1697A. In *Howlett* v. *Tarte* (*m*) the rule was laid down as follows: "If the defendants attempted to put on record a plea which was inconsistent with any traversable allegation in the former declaration there would be an estoppel," but this rule is "confined to allegations which the defendant could have traversed, and does not extend to pleas which confessed and avoided, or to matters which were not raisable by traverse but by special plea, necessitating proof on the part of the defendant, such as fraud, gaming, release, or infancy, allegations which do not amount to denial, but to confession and avoidance of the contract" (*n*); accordingly, where a plaintiff had recovered judgment against a defendant for arrears of rent in a previous action in which the defence was that no agreement had been concluded, the same defendant was not allowed in a subsequent action to set up the defence of the Statute of Frauds, because the issue which the plaintiff had to prove in the first action was the existence of an agreement binding and valid at law, and this was traversable by the defendant (*o*).

§ 1698. If to an action for trespassing on a close, whether described by abuttals or name, the defendant were to rely on a statement that the spot in dispute was his own freehold, and obtain a verdict, this record would not estop the plaintiff from bringing a second action

(*i*) *Hitchin* v. *Campbell*, (1771) 2 W. Bl. 779, 832; as explained in *Buckland* v. *Johnson*, (1854) 15 C. B. 161, 162; 23 L. J. C. P. 204; 100 R. R. 280.

(*k*) *Evelyn* v. *Haynes*, (1782) per Ld. Mansfield, cited and explained by Ld. Ellenborough in *Outram* v. *Morewood*, (1803) 3 East, 365; 7 R. R. 473.

(*l*) *Howlett* v. *Tarte*, (1861) 10 C. B. (N.S.) 813; 31 L. J. C. P. 146; 128 R. R. 948. See, also, for another illustration, *Hall* v. *Levy*, (1875) L. R. 10 C. P. 154; 44 L. J. C. P. 89.

(*m*) (1861) 10 C. B. (N.S.) 813.

(*n*) Farwell, L.J., delivering the judgment of the Court of Appeal in *Humphries* v. *Humphries*, [1910] 2 K. B. 531; 79 L. J. K. B. 919.

(*o*) *Humphries* v. *Humphries*, *supra*. See, also, *Cooke* v. *Rickman*, [1911] 2 K. B. 1125; 81 L. J. K. B. 38.

for a trespass committed on the same close; for, as the defendant, to support such a statement of defence need not have proved his title to the whole close, but might have rested satisfied with showing that the part on which the trespass was committed belonged to him, the only effect of the record in a subsequent action between the same parties, or those claiming under them, would be to prove that some part of the close was the defendant's property; and this would not bar the plaintiff's right, unless it could be further shown, that the trespasses in the two actions were committed on the same part (*p*). In *R.* v. *Fairie* (*q*), where the defendant was indicted for causing a nuisance by keeping up furnaces for making animal charcoal, his former conviction by justices for an offence against the Smoke Consumption Act of 1853 (*r*), committed at the same place and in the course of the same trade, was tendered in evidence. The court, however, held, that this document could not be received, as the statutable offence was not, of necessity, the doing any act, which would constitute an indictable nuisance at common law.

§ 1699. It matters not in regard to the conclusive effect of a judgment, whether the plaintiff in the second action was the plaintiff or defendant in the first, provided the point in dispute be the same in both suits. Therefore, if an action be brought for goods sold and delivered with a warranty, or for work and labour done, or for goods supplied, under a contract, and the defendant elect to show, as he may do, how much less the subject-matter of the action was worth, by reason of the breach of the warranty or contract; he will be considered as having satisfaction for the breach, to the extent that he obtained, or was, after such election, capable of obtaining, an abatement of price on that account; and to that extent, but no further, he will be precluded from recovering in another action (*s*). So, a verdict negativing any right which a defendant sets up in his defence, will estop him from asserting that right as plaintiff in a subsequent action against his former opponent. For instance, if to an action for a breach of contract, the defendant relies on a set-off or counterclaim, and the issue thereon is found against him, he cannot afterwards sue the plaintiff for the demand specified in that statement of defence (*t*).

§ 1700. In applying this rule to cross-actions, care must be taken to distinguish between cases, where the points in issue are identical,

(*p*) *Smith* v. *Royston*, (1841) 8 M. & W. 386—388; 10 L. J. Ex. 437, per Alderson, B. See *Whittaker* v. *Jackson*, (1864) 33 L. J. Ex. 181; 2 H. & C. 926; 133 R. R. 862.

(*q*) (1857) 8 E. & B. 486; 112 R. R. 659.

(*r*) 16 & 17 V. c. 128, s. 1.

(*s*) *Mondel* v. *Steel*, (1841) 8 M. & W. 858, 871, 872; 10 L. J. Ex. 426; 58 R. R. 890. See *Thornton* v. *Place*, (1832) 1 M. & Rob. 218; 42 R. R. 781.

(*t*) *Eastmure* v. *Laws*, (1839) 5 Bing. N. C. 444; 8 L. J. C. P. 236; 50 R. R. 745. See *Stanton* v. *Styles*, (1850) 1 L. M. & P. 575; 19 L. J. Ex. 336.

and those, where both suits merely relate to the same transaction or property. In the latter case the recovery of a verdict by the plaintiff in one action will not estop the defendant from bringing a subsequent action against him. Thus, where the purchaser of a kitchen range, on being sued for the stipulated price, paid £40 into court, which was accepted in satisfaction of the cause of action; it was held that he was not estopped thereby from suing the maker for negligence in the construction of the range (*u*). True, the purchaser might, if he had thought fit, have relied upon the bad workmanship of the article bought as a defence to the former action; but he was not bound to take that course, and having omitted to do so, he had a perfect right to maintain a separate action for the damage, which he had sustained on that account (*v*).

§ 1701. A convenient and safe *test* for ascertaining whether or not the judgment in one action should be a bar to another, is to consider whether the same evidence would or would not sustain both (*x*); but if the statements of claim be framed in such a manner, that the causes of action may be identical in the two suits, the party bringing the second action must show that they are not the same, for he has no right to leave the question of identity to be determined, on a nice investigation of the facts and pleadings (*y*). In one case, indeed, where the plaintiff had in a former action declared upon a promissory note, and for goods sold, but, upon executing the writ of inquiry after judgment by default, he had not been prepared with evidence on the count for goods sold, and had therefore taken his damages for the amount only of the note; he was permitted, in a second action for the goods sold, to prove this fact by parol, and the first judgment was held to be no bar to the second suit (*z*). In another case, too, a plaintiff declared in debt for use and occupation of a farm, with the usual money counts, and in his particulars of demand he claimed a certain sum for the value of stone taken from a quarry on the farm. At the trial he confined his evidence to the count for use and occupation, and obtained a general verdict. Before this action was tried, the plaintiff brought another against the same defendant for quarrying and taking away stone; and the court held, on the trial of the action on the case,

(*u*) *Rigge* v. *Burbidge*, (1846) 15 M. & W. 598; 15 L. J. Ex. 309.

(*v*) *Davis* v. *Hedges*, (1871) L. R. 6 Q. B. 687; 40 L. J. Q. B. 276.

(*x*) *Hitchin* v. *Campbell*, (1772) 2 W. Bl. 831; *Martin* v. *Kennedy*, (1800) 2 B. & P. 71; *Wadsworth* v. *Bentley*, (1854) 23 L. J. Q. B. 3; 98 R. R. 472; *Hunter* v. *Stewart*, (1861) 31 L. J. Ch. 350; 4 De G. F. & J. 178; 135 R. R. 72; *Dolphin* v. *Aylward*, (1864) 15 Ir. Ch. R. 583.

(*y*) *Ld. Bagot* v. *Williams*, (1824) 3 B. & C. 239; 27 R. R. 340; *Seddon* v. *Tutop*, (1796) 6 T. R. 609; 3 R. R. 274.

(*z*) *Seddon* v. *Tutop*, *supra*; recognised by Bayley, J., in *Ld. Bagot* v. *Williams*, *supra*; and by Best, C.J., in *Thorpe* v. *Cooper*, (1828) 5 Bing. 129. See *Preston* v. *Peeke*, (1858) 27 L. J. Q. B. 424; E. B. & E. 336; 113 R. R. 663; cited *ante*, § 85.

that the tort was not waived by the plaintiff's abandonment of his claim for the value of the stone as stated in the particulars, and that, consequently, the second action was maintainable notwithstanding the former recovery (*a*).

§ 1702. On the other hand, it has been laid down as a general rule, which is recognised alike in all courts, that "where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case (*b*). The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" (*c*).

§ 1703. Many cases in Chancery might be cited in illustration of the above rule (*d*), but it will suffice to refer to a few common-law decisions connected with this subject. Thus, it has been determined, that if a plaintiff obtains an interlocutory judgment for his whole claim, but afterwards, to avoid delay, attends before the officer of the Court to have his damages assessed on one item only, and enters a *nolle prosequi* as to the others, this will bar any future action for the last-mentioned items; a *nolle prosequi* as to part, entered up after judgment for the whole, being equivalent to a *retraxit* (*e*). *A fortiori*, if a plaintiff, having declared on several causes of action, fails to establish some of them at the trial for want of evidence, he cannot bring a second action to recover damages for these last, unless he either at the trial obtain an order from the judge under Ord. XXXVI., r. 1, in the nature of a nonsuit, or can

(*a*) *Hadley* v. *Green*, (1832) 2 Tyr. 390; 1 L. J. Ex. 137; 37 R. R. 743. See *Bridge* v. *Gray*, (1833) 14 Pick. 55; *Webster* v. *Lee*, (1809) 5 Mass. 334; *Phillips* v. *Berrick*, (1819) 16 Johns. 136.

(*b*) See *Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 667, 672; 65 L. J. Ch. 314.

(*c*) *Henderson* v. *Henderson*, (1843) 3 Hare, 115; 64 R. R. 213; per Wigram, V.-C. See, also, *Srimut Rajah* v. *Katama Natchiar*, (1866) 11 Moore Ind. App. 50; and *Serrao* v. *Noel*, (1885) 15 Q. B. D. 549.

(*d*) *Farquharson* v. *Seton*, (1828) 5 Russ. 45; *Partridge* v. *Usborne*, (1828) *id.* 195; *Chamley* v. *Ld. Dunsany*, (1807) 2 Sch. & Lef. 718; *Breadalbane* (*Marquis*) v. *Chandos* (*Marquis*), (1837) 2 Myl. & Cr. 732, 733; 7 L. J. Ch. 28; 45 R. R. 172.

(*e*) *Bowden* v. *Horne*, (1831) 7 Bing. 716; 9 L. J. (O.S.) C. P. 229.

induce the court to set aside the verdict he has obtained (*f*) on the ground of mistake, surprise, or accident. So, if he sues for part only of an indivisible claim, as if one serves another for a year under the same hiring, and then brings an action for a month's wages, it is a bar to the whole (*g*). Upon the same principle, if a plaintiff, knowing that he has an unliquidated claim against a defendant for a large amount, chooses to sue him for a less sum than is due; or if, having a demand for £60, in three sums of £20, he consents at Nisi Prius to take a verdict for £40, he cannot afterwards bring a second action for the residue (*h*). So, if all matters in difference between two parties are referred, and one of them declines to bring before the arbitrator some claim which is included within the scope of the reference, he cannot make this claim the subject of a fresh action (*i*). In an action for damages from injury resulting from a tort, the plaintiff may and should recover in respect of all damage arising from the cause of action sued on, whether present or prospective, and having recovered damages in one action he cannot recover in another for damages which have subsequently accrued from that cause of action (*k*); when, however, the damage itself constitutes the cause of action (as in the case of subsidence of a neighbour's land caused by excavation by defendant on his own land) and not the original act of the defendant *per se*, a fresh action may be brought in respect of subsequent damage as an injury arises (*l*).

§ 1704. The County Court Act, 1888 (*m*), contains an important clause relative to this subject; for it enacts, in section 81, "it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more actions in any of the Courts (*n*), but any plaintiff, having cause of action for more than one hundred pounds (*o*) for which a plaint might be entered, if not for more than one hundred pounds, may abandon the excess, and thereupon the plaintiff shall on proving his case, recover to an amount not exceeding one hundred pounds; and the judgment of the court upon such plaint

(*f*) *Stafford* v. *Clarke*, (1824) 2 Bing. 382.

(*g*) *Miller* v. *Covert*, (1828) 1 Wend. 487.

(*h*) *Ld. Bagot* v. *Williams*, *supra*.

(*i*) *Smith* v. *Johnson*, (1812) 15 East, 213; 13 R. R. 449; *Dunn* v. *Murray*, (1829) 9 B. & C. 780, 788; 7 L. J. (O.S.) K. B. 320; 33 R. R. 327. See *Ravee* v. *Farmer*, (1791) 4 T. R. 146; 2 R. R. 347.

(*k*) *Fetter* v. *Beale*, (1699) 1 Salk. 11; *Darley Main Colliery Co.* v. *Mitchell*, (1886) 11 A. C. 127; 55 L. J. Q. B. 529.

(*l*) *Darley Main Colliery Co.* v. *Mitchell*, *supra*.

(*m*) 51 & 52 V. c. 43. The Act of 14 & 15 V. c. 57, which regulates the practice in Irish Civil Bill courts, contains similar provisions in s. 36.

(*n*) "These words do not, in terms, prohibit the splitting a demand, for the purpose of bringing one suit in the County Court, and another in the Superior Court"; per Maule, J., in *Vines* v. *Arnold*, (1849) 8 C. B. 638; 19 L. J. C. P. 98; 79 R. R. 653.

(*o*) "One hundred" was substituted for "fifty" by the County Court Act, 1903 (3 Ed. 7, c. 42).

shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The term "cause of action," here employed, is one of indefinite import; but the courts have fixed its meaning to a certain extent, by holding, first, that it is not limited to a cause of action on one separate entire contract, but that it extends to tradesmen's bills, where the dealing is intended to be continuous, and where the items are so far connected with each other, that if they be not paid, they form one entire demand (*p*); and next, that it did not preclude the plaintiff from bringing distinct plaints, whenever the claims were of such a nature as would have justified the introduction of two or more counts in the declaration, if the action had been brought in the Superior Court (*q*). In conformity with this last rule, a landlord has been allowed to sue his tenant in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit (*r*). So, the holder of a promissory note, whereby the maker has specially undertaken to pay a particular rate of interest, may, as it seems, first sue for the interest, and afterwards recover the principal in a second action (*s*).

§ 1705. The rule requiring an identity in the points at issue, but allowing a diversity in the forms of proceeding, has hitherto been illustrated by referring to cases, where a judgment recovered in one action has, or has not, been regarded as a bar to a second action. The same doctrine, however, will be found to prevail in criminal prosecutions; and therefore, although, in order to warrant a prisoner in pleading *autrefois acquit*, or *autrefois convict*, the form of the two indictments, or even the nature of the charges need not be identical, yet, unless the first indictment were one, upon which the prisoner might have been convicted by proof of the facts necessary to support the second indictment, an acquittal or conviction on the first trial will be no bar to the second (*t*). Thus, if a prisoner, indicted for burglariously breaking and entering a house, and stealing therein certain goods of A., be acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house, and stealing other goods of B. (*u*). Neither will his acquittal on a charge of burglary and stealing avail him on an indictment for burglary with intent to steal (*v*). So, if a prisoner

(*p*) *In re Aykroyd*, (1847) 1 Ex. 479; 17 L. J. Ex. 157; 74 R. R. 729.
(*q*) *Wickham* v. *Lee*, (1848) 12 Q. B. 526; 18 L. J. Q. B. 21; 76 R. R. 334.
(*r*) *Id.* 521.
(*s*) *Morgan* v *Rowlands*, (1872) L. R. 7 Q. B. 493; 41 L. J. Q. B. 187.
(*t*) *R.* v. *Gilmore*, (1882) 15 Cox C. C. 85.
(*u*) Per Buller, J., delivering the opinion of all the judges in *R.* v. *Vandercomb*, (1796) 2 Lea. 718, 719, and overruling *Turner's Case*, (1664) Kel. 30, and *Jones & Beaver's Case*, (1665) Kel. 52.
(*v*) *R.* v. *Vandercomb*, *supra*.

be indicted under section 12 of the Act of 24 & 25 V. c. 99, for unlawfully uttering counterfeit coin after a previous conviction for a like offence, and be acquitted of that felony, such acquittal cannot be pleaded in bar if he be afterwards indicted for the simple misdemeanour of uttering counterfeit coin (*x*).

§ 1706. So, upon an indictment for the statutable felony of administering poison with intent to murder, a previous acquittal on an indictment for murder, founded on the same facts, cannot be pleaded in bar (*y*). An acquittal upon a charge of murder is no bar to a subsequent charge of arson on the same facts (*z*), nor is an acquittal for sodomy a bar to a subsequent charge of committing an act of gross indecency (*a*). Neither will an acquittal upon an indictment for wounding with intent to kill, protect the accused from being subsequently indicted for murder upon the death of the person assaulted (*b*). So, if a prisoner be charged with rape and acquitted, he may still, should the facts warrant such a course, be indicted either for an assault with intent to commit that crime (*c*), or for a common assault (*d*). So, where two or more persons have committed successive rapes upon the same woman, though one of them be acquitted when charged as a principal in the first degree, he may still be indicted for being present aiding and abetting the others to commit the crime (*e*). So, if a bankrupt be indicted for omitting certain goods out of his schedule, his acquittal or conviction will be no bar to a second prosecution against him for omitting other goods, though as such a course of proceeding savours of oppression, it would under ordinary circumstances be discountenanced by the judge (*f*). In all these cases, and in many others of a similar nature, the prisoner could not by possibility have been legally convicted on the first indictment of the offence charged in the second; and therefore the ancient maxim of the common law, that no man shall be twice brought into jeopardy for the same crime (*g*), is in no respect contravened by the second trial. It is immaterial whether the first acquittal were upon summary proceedings or indictment (*h*).

(*x*) *R.* v. *Thomas*, (1875) 13 Cox C. C. 52.

(*y*) *R.* v. *Connell*, (1853) 6 Cox C. C. 178.

(*z*) *R.* v. *Serné*, (1888) 107 C. C. C. Sess. Pap. 418.

(*a*) *R.* v. *Barron*, [1914] 2 K. B. 570; 83 L J. K. B. 786.

(*b*) *R.* v. *de Salvi*, (1857) C. C. C. Sess. Pap. vol. 46, p. 884, referred to in *R.* v. *Morris*, (1867) L. R. 1 C. C. R. 93; 36 L. J. M. C. 85.

(*c*) *R.* v *Gisson*, (1847) 2 Car. & K. 781. But not for an attempt to commit the crime, for he might have been convicted of that upon the previous indictment; 14 & 15 V. c. 100, s. 9.

(*d*) *R.* v. *Dungey*, (1864) 4 F. & F. 99.

(*e*) See *R.* v. *Parry*, (1837) 7 C. & P. 836.

(*f*) *R.* v. *Champneys*, (1837) 2 M. & Rob. 26.

(*g*) See *R.* v. *Murphy*, (1859) 28 L. J. C. P. 53.

(*h*) *Wemyss* v. *Hopkins*, (1875) L. R. 10 Q. B. 378; 44 L. J. M. C. 101; *R.* v. *Miles*, (1890) 24 Q. B. D. 423; 59 L. J. M. C. 56.

§ 1707. On the other hand, an acquittal on an indictment charging the prisoner as a principal felon, will now (*i*) be a bar to an indictment against him as an accessory before the fact, because, under an Act passed in 1861 (*k*), "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." Again, no person tried for any misdemeanour is liable, unless the jury have been discharged from giving a verdict, to be afterwards prosecuted for felony on the same facts (*l*). No person tried for obtaining by any false pretence any chattel, money, or valuable security, is liable to be afterwards prosecuted for larceny upon the same facts, nor is a person tried for stealing any chattel, money or valuable security liable to be afterwards prosecuted for obtaining by false pretences upon the same facts (*m*). So, also, no person tried for embezzlement, or fraudulent application or disposition, as a clerk or servant, or as a person employed in either of those capacities, or as a person employed in the public service, or in the police, can be afterwards indicted for larceny upon the same facts, and no person tried for larceny is liable to a second prosecution for embezzlement, or for fraudulent application or disposition (*n*).

§ 1708. So, if a prisoner be indicted for a compound crime, and be wholly acquitted, he cannot be afterwards charged with any offence included in such crime (*o*); provided that in such case the prisoner, though acquitted of the more serious charge, might still, on the first indictment, have been found guilty of the lighter offence. For instance, if one has been acquitted on an indictment for murder, he is protected against a second prosecution for manslaughter (*p*); and, indeed, if a party be charged with any felony or misdemeanour, and be wholly acquitted, he cannot be subsequently indicted for an attempt to commit the same crime, since, on the first indictment,

(*i*) The law was formerly otherwise. See *R.* v. *Plant*, (1836) 7 C. & P. 575.

(*k*) 24 & 25 V. c. 94, s. 1.

(*l*) 14 & 15 V. c. 100, s. 12, enacts, that "If upon the trial of any person for any misdemeanour, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour."

(*m*) See the Larceny Act, 1916 (6 & 7 G. 5, c. 50), s. 44, sub-s. (3) and (4); and *R.* v. *Barron*, (No. 2), [1914] 2 K. B. 570; 83 L. J. K. B. 786. For the law before the passing of this Act see 24 & 25 V. c. 96, s. 88.

(*n*) 6 & 7 G. 5, c. 50, ss. 17 and 44 (2).

(*o*) *R.* v. *Barron*, *supra*.

(*p*) 2 Hale, 246.

the jury may now acquit of the felony or misdemeanour charged, and find a verdict of guilty of the attempt, if the evidence shall warrant such finding (*q*). Again, an acquittal on a charge of administering poison, so as to endanger life, or to inflict grievous bodily harm, is a bar to an indictment for administering poison with intent to injure, aggrieve, or annoy any one (*r*). So, if a person be indicted for robbery, for stealing in a dwelling-house, for burglary in breaking into a house and stealing goods, for larceny as a servant (*s*), or for stealing from the person, and be generally acquitted, the acquittal will be a bar to any future indictment for the simple larceny (*t*); and if a man be tried for robbery, he will also be protected from any second prosecution for assaulting with intent to rob (*u*).

§ 1709. It seems, too, that the converse of this rule holds good; and, therefore, if a prisoner be acquitted or convicted of manslaughter, or of simple larceny, he cannot in the first event be afterwards indicted for the murder of the same person (*v*), or in the second event, be indicted for compound larceny with respect to the same property (*x*). Whether a person accused of a lesser offence is acquitted or convicted, he may not be afterwards charged with a more aggravated offence upon the same facts (*y*), but where a person has been acquitted or convicted of assault, he may be charged subsequently with murder or manslaughter should the party assaulted die, as the death affords a fresh fact for the accused to answer (*z*). If a bill be preferred for one offence, and the evidence prove a greater, the judge should not direct the jury to acquit, but should discharge the jury of that indictment, and order a fresh one to be preferred (*a*). An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal (*b*). In such a case the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted (*c*).

(*q*) 14 & 15 V. c. 100, s. 9, cited *ante*, § 269. See, also, 14 & 15 V. c. 19, s. 5; also *R.* v. *Miller*, (1879) 14 Cox C. C. 356.

(*r*) 24 & 25 V. c. 100, s. 25.

(*s*) *R.* v. *Jennings*, (1858) 7 Cox C. C. 397.

(*t*) See *R.* v. *Compton*, (1828) 3 C. & P. 418.

(*u*) 6 & 7 G. 5 c. 50, s. 44 (1). See *R.* v. *Mitchell*, (1852) 2 Den. 468.

(*v*) 2 Hale, 246; *Holtcroft's Case*, (1578) 4 Rep. 46 *b*; Foster 326. See *R.* v. *Tancock*, (1876) 13 Cox C. C. 217.

(*x*) *R.* v. *Berigan*, (1841) Ir. Cir. R. 177.

(*y*) *R.* v. *Elrington*, (1861) 1 B. & S. 688; 31 L. J. M. C. 14; 124 R. R. 718; *R.* v. *Miles*, (1890) 24 Q. B. D. 423; 59 L. J. M. C. 56.

(*z*) *R.* v. *Morris*, (1867) L. R. 1 C. C. R. 90; *R.* v. *Salvi*, (1857) 10 Cox C. C. 481; *R.* v. *Tonks*, (1916) 1 K. B. 443; 85 L. J. K. B. 396.

(*a*) See Fost. C. L. 327, 328.

(*b*) *R.* v. *Roche*, (1775) 1 Leach. 134; *R.* v. *Hutchinson*, (1678) 3 Keb. 785.

(*c*) *Beak* v. *Tyrrwhit*, (1688) 3 Mod. 194; *R.* v. *Roche*, *supra*.

§ 1710. The doctrine just explained has, on several occasions, been recognised and adopted by the Legislature. Thus a summary conviction in respect of any offence punishable in that mode under either of the Acts of 1861, relating to larcenies, or to malicious injuries to property (*d*), or under the Seamen's Clothing Act, 1869 (*e*), is, in itself, a bar to any other proceeding for the same cause. So, where any person, who has been charged before justices with a common assault, or with an aggravated assault on a woman or child, has either obtained a certificate of dismissal, or been summarily convicted, he is released "from all further or other proceedings, civil or criminal, for the same cause" (*f*). The word "cause" here used is sufficiently ambiguous, as it may mean either "act" or "charge," and its legal effect will materially vary according to which of these two interpretations shall prevail. Hitherto the matter has not been reasoned out by the lawyers in a very satisfactory way, but a divided court has determined thus much, that, in spite of the Act, a summary conviction for assault is no bar to an indictment for manslaughter, when the party assaulted has subsequently died from the effects of the blows (*g*). On the other hand, it has been held more than once, that a man who has been either acquitted or convicted before justices of an assault, could not afterwards be indicted for felonious wounding in the same transaction (*h*). So, also, when a person has been convicted of a common assault on a married woman and has paid the penalty imposed, he cannot afterwards be sued by the husband of the woman for the loss which he, as such husband, has sustained by the assault on his wife (*i*). So, if a magistrate, on hearing a summons against a cabman for furious driving, were to award compensation to the party aggrieved, such party would be barred from bringing any subsequent action in respect of any injury sustained by him, either against the cabman or his employer, unless, indeed, he had, from the first, refused to submit himself to the magistrate's jurisdiction (*k*). A conviction, to satisfy the statute, must be followed by fine or imprisonment, and be proved by the record or an examined copy (*l*).

(*d*) 24 & 25 V. c. 96, s. 109; 24 & 25 V. c. 97, s. 67.

(*e*) 32 & 33 V. c. 57, s. 6.

(*f*) 24 & 25 V. c. 100, s. 45. See *ante*, § 1616.

(*g*) *R.* v. *Morris*, (1867) L. R. 1 C. C. R. 93; 36 L. J. M. C. 84, per Martin, B., and Byles, Keating, and Shee, JJ., Kelly, C. B., diss.

(*h*) *R.* v. *Walker*, (1843) 2 M. & Rob. 446; *R.* v. *Stanton*, (1851) 5 Cox C. C. 324; *R.* v. *Ebrington*, *supra*. See, also, *Wemyss* v. *Hopkins*, (1875) L. R. 10 Q. B. 378; 44 L. J. M. C. 101.

(*i*) *Masper & Wife* v. *Brown*, (1875) 45 L. J. C. P. 203; 1 C. P. D. 97.

(*k*) *Wright* v. *London Omnibus Co.*, (1877) 46 L. J. Q. B. 429; 2 Q. B. D. 271; 6 & 7 V. c. 86, s. 28.

(*l*) *Hartley* v. *Hindmarsh* (1866) L. R. 1 C. P. 553; 35 L. J. M. C. 255.

§ 1710A. Various statutory provisions also exist dealing with the effect of prior indictments; thus the Piracy Act, 1744 (*m*), provides that persons tried and acquitted or convicted for piracy shall not be liable to be tried again "for the same fact" for high treason. The Incitement to Mutiny Act (*n*) contains a similar proviso, so do the Unlawful Oaths Acts (*o*), and the Treason Felony Act (*p*). The Criminal Law Procedure Act, 1851 (*q*), provides that a person tried for misdemeanour shall not be entitled to acquittal, because the evidence proves a felony, and shall not be tried again on the same facts for felony unless the court so directs. The same Act, while permitting conviction of an attempt on a charge for the full offence, forbids a second trial for the attempt (*r*). By the Interpretation Act, 1889 (*s*), where an act or omission constitutes an offence under two or more Acts, or under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted or punished under either or any of those Acts, or at common law, but shall not be liable to be punished twice for the same offence.

§ 1711. Having thus pointed out the distinction which exists between the admissibility and effect of judgments *in rem* and of judgments *inter partes*, it will be expedient to refer shortly to some rules which govern equally both classes of instruments. And first, it is laid down as an unquestionable rule of law, that neither a judgment *in rem*, nor a judgment *inter partes*, is evidence of any matter which may or may not have been controverted, or which came collaterally in question, or which was incidentally cognisable, or which can only be inferred by argument from the judgment (*t*). For instance, on an appeal against an order of removal, where the respondents relied on a derivative settlement from the pauper's father, they were not allowed to put in a previous order for the removal of the pauper's brother to the appellant parish, together with the examinations on which it was founded, though these examinations clearly proved that the brother's settlement was derived from the father (*u*). The order in this case for removing the brother was silent as to the ground of removal, and the court held that the examinations, being no part of

(*m*) 18 G. 2. c. 30.
(*n*) 37 G. 3. c. 70, s. 3.
(*o*) 37 G. 3, c. 123, s. 7; and 52 G. 3, c. 104, s. 8.
(*p*) 11 & 12 V. c. 12, s. 7.
(*q*) 14 & 15 V. c. 100, s. 12.
(*r*) S. 9.
(*s*) 52 & 53 V. c. 63.
(*t*) *R.* v. *Duchess of Kingston*, (1776) 20 How. St. Tr. 538. See *R.* v. *Hutchins*, (1880) 6 Q. B. D. 300; 50 L. J. M. C. 35.
(*u*) *R.* v. *Sowe*, (1843) 4 Q. B. 93; 12 L. J. M. C. 38; *R.* v. *Knaptoft*, (1824) 2 B. & C. 883; explained in *R.* v. *Hartington Middle Quarter*, (1855) 4 E. & B. 795, 796; 24 L. J. M. C. 98; 99 R. R. 746.

the record, could not be used to prove the particular species of settlement on which it rested (*v*).

§ 1712. So, where an action of trover was brought against the administrator of a woman by a man who claimed to be her widower, and the defendant relied on the letters of administration, insisting that they could not have been granted to him but upon the supposition that the plaintiff and the intestate had never been married, the court held that, inasmuch as that question had never been put in issue and decided in the Ecclesiastical Court, they were not at liberty to infer, from the grant of administration, that the parties were unmarried (*x*). So, the probate of a will, purporting to have been made by a married woman in pursuance of a power, furnishes no evidence whatever that the power has been duly executed; because the Probate Division has simply to determine on the validity of the instrument as an ordinary will of an ordinary person, and in case no valid objection can be taken to it, when regarded in this light, it is incumbent on the court to grant probate, and to leave the question respecting the due execution of the power to be decided by the Chancery Division (*y*). So, where to debt on bond the defendant,—before usury was legalised (*z*)—had pleaded a usurious agreement between the plaintiff and himself, and the plaintiff by his replication had not traversed the alleged usurious character of the agreement, but only that the bond had been given pursuant to it, and the defendant had succeeded in that action upon the issue thus raised, the plaintiff was not estopped in a subsequent action on a collateral security for the same debt, from disproving the alleged usurious character of the agreement, inasmuch as the usurious character of such agreement had not been directly in issue in the action on the bond (*a*).

§ 1713. In the next place, no doubt can be entertained that wherever a judgment is offered in evidence against a stranger, he may avoid its effects, by furnishing distinct proof that it was obtained by *fraud* or *collusion*. To borrow the language of Lord Chief Justice De Grey, "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings in courts of justice. Lord Coke says, it avoids all judicial

(*v*) 4 Q. B. 98. See *ante*, § 809, *ad fin.*

(*x*) *Blackham's Case*, (1708) 1 Salk. 290, 291; cited and explained by Lord Lyndhurst in *Barrs* v. *Jackson*, (1845) 1 Phill. 588, 589; 14 L. J. Ch. 433; 65 R. R. 457.

(*y*) *Barnes* v. *Vincent*, (1846) 5 Moore P. C. 201; 70 R. R. 36; *Chatelain* v. *Pontigny*, (1859) 1 Sw. & Tr. 411; *Parkinson* v. *Townsend*, (1875) 44 L. J. P. & M. 32. See *Ward* v. *Ward*, (1848) 11 Beav. 377; *Noble* v. *Phelps & Willock*, (1871) L. R. 2 P. & D. 276; 41 L. J. P. & M. 46.

(*z*) 17 & 18 V. c. 90.

(*a*) *Carter* v. *James*, (1844) 13 M. & W. 137; 13 L. J. Ex. 373; 67 R. R. 531.

acts, ecclesiastical or temporal" (*b*). In applying this rule it matters not whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment, which can be clearly shown to have been obtained by manifest fraud (*c*). But in the case of judgments affecting status the only kind of fraud which can be set up by a third party is fraud going to the root of the jurisdiction of the court in which the judgment was obtained (*d*). *Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur* (*e*). Whether an innocent party would be allowed to prove in one court that a judgment against him in another court was obtained by fraud, is a question not equally clear, as it would be in his power to apply directly to the court which pronounced the judgment to vacate it (*f*); but, however this point may be ultimately determined, thus much is evident, that a guilty party would not be permitted to defeat a judgment, by showing that, in obtaining it, he had practised an imposition on the court; for it would be an outrage to justice and common sense, if a person could thus avoid the consequences of his own fraudulent conduct (*g*).

§ 1714. Again, every species of judgment will be rendered inadmissible in evidence, by showing that the court from which it emanated had *no jurisdiction* (*h*). For instance, if, before the 11th of January, 1858 (*i*), an executor or administrator had sued on a probate or letters of administration granted by a diocesan, the defendant might have defeated his title, by pleading and proving that the

(*b*) *R.* v. *Duchess of Kingston*, (1766) 20 How St. Tr. 544; *Brownsword* v. *Edwards*, (1751) 2 Ves. Sen. 246; *Philipson* v. *Ld. Egremont*, (1844) 6 Q. B. 605; 14 L. J. Q. B. 25; 66 R. R. 493; *Meddowcroft* v. *Huquenin*, (1844) 4 Moore P. C. 386; *Perry* v. *Meddowcroft*, (1846) 10 Beav. 122; *Harrison* v. *Corp. of Southampton*, (1853) 4 De G. M. & G. 137; 102 R. R. 61; *Ochsenbein* v. *Papelier*, (1873) L. R. 8 Ch. 695; 42 L. J. Ch. 861.

(*c*) *Shedden* v. *Patrick*, (1854) 1 Macq. H. L. 535. See *Eyre* v. *Smith*, (1877) 2 C. P. D. 435.

(*d*) *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60.

(*e*) Per Wedderburn, S. G., in *R.* v. *Duchess of Kingston*, *supra*; cited by Ld. Cranworth in *Shedden* v. *Patrick*, *supra*.

(*f*) *Prudham* v. *Phillips*, (1738) 2 Ambl. 763; *R.* v. *Duchess of Kingston*, (1766) 20 How. St. Tr. 544; *Shedden* v. *Patrick*, *supra*. See *Ex. p. White* v. *Tommey*, (1853) 4 H. L. C. 313; 94 R. R. 125.

(*g*) *Prudham* v. *Phillips*, (1738) 2 Ambl. 763. See *Doe* v. *Roberts*, (1819) 2 B. & Ald. 367; 20 R. R. 477; *Bessey* v. *Windham*, (1844) 6 Q. B. 166; 14 L. J. Q. B. 7; 66 R. R. 336.

(*h*) *R.* v. *Bp. of Chester*, (1748) 1 W. Bl. 25, per Lee, C.J., as to sentences of visitors; *R.* v. *Washbrook*, (1825) 4 B. & C. 732, as to awards by public commissioners; *Mann* v. *Owen*, (1829) 9 B. & C. 595; 7 L. J. (O.S.) K. B. 255, as to sentences of courts-martial. See, also, *Briscoe* v. *Stephens*, (1824) 2 Bing. 213; 3 L. J. (O.S.) C. P. 257; 27 R. R. 597; *Abp. of Dublin* v. *Ld. Trimleston*, (1849) 12 Ir. Eq. R. 251, 267, 268; and *Linnell & Walker* v. *Gunn*, (1867) L. R. 1 A. & E. 363.

(*i*) When the Probate Acts of 1857, for England and Ireland, came into operation.

testator, or intestate, had *bona notabilia* in other dioceses within the same province; because, under the old law, the metropolitan, and not the diocesan, would, in such a case, have had jurisdiction to grant probate or administration (*k*). Again, a probate or letters of administration may still be defeated by proving that the supposed testator or intestate is alive; for, in this event, the Probate Division can have had no jurisdiction, nor its sentence any effect (*l*). So, if a prisoner was tried before the Quarter Sessions, on a day to which the court had not been duly adjourned (*m*), or for an offence which the justices or recorders are by statute restrained from trying (*n*), his acquittal or conviction would be no bar to a future indictment for the same offence, because the former proceedings, being *coram non judice*, would be a mere nullity.

(*k*) *Marriot* v. *Marriot*, (1726) 1 Str. 671; *Stokes* v. *Bate*, (1826) 5 B. & C. 491; 4 L. J. (O.S.) K. B. 221. See, also, *Huthwaite* v. *Phaire*, (1840) 1 Man. & G. 159; 9 L. J. C. P. 259; *Whyte* v. *Rose*, (1842) 3 Q. B. 493; 61 R. R. 275; *Easton* v. *Carter*, (1850) 5 Ex. 8; 19 L. J. Ex. 173.

(*l*) *Allen* v. *Dundas*, (1789) 3 T. R. 129, 130; 1 R. R. 666.

(*m*) *R.* v. *Bowman*, (1834) 6 C. & P. 337.

(*n*) The Act 5 & 6 V. c. 38 gives a list of offences not triable at Quarter Sessions. In the following list that enactment must, unless some other statute is specifically mentioned, be taken to be that containing the prohibition. The offences not triable at Quarter Sessions are treason, murder, capital felony, or any felony, except burglary (6 & 7 G. 5, c. 50, s. 38), which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life (20 & 21 V. c. 3, ss. 2, 6), or any of the following offences :—

1. Misprision of treason;
2. Offences against the King's title, prerogative, person, or government, or against either House of Parliament;
3. Offences subject to the penalties of præmunire;
4. Blasphemy, and offences against religion;
5. Administering or taking unlawful oaths;
6. Perjury and subornation of perjury (1 & 2 G. 5, c. 6);
7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanour;
8. Forgery (3 & 4 G. 5, c. 27, s. 13);
9. Offences against the False Personation Act, 1874, 37 & 38 V. c. 36;
10. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;
11. Bigamy; and offences against the laws relating to marriage;
12. Abduction of women and girls; and indictable offences against the Criminal Law Amendment Act, 1885 (48 & 49 V. c. 69, s. 17);
13. Endeavouring to conceal the birth of a child;
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels;
15. Bribery, except bribery of and by members, &c., of corporations within 52 & 53 V. c. 69, s. 6;
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence, which such justices or recorder respectively have or has jurisdiction to try when committed by one person;
17. Stealing, or fraudulently taking, or injuring, or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein;
18. Stealing, or fraudulently destroying or concealing, wills, or testamentary papers, or any document or written instrument being, or containing evidence

§ 1715 Questions of jurisdiction most frequently arise with regard to summary convictions by magistrates, orders of justices, inquisitions found by sheriff's juries, and other judicial proceedings of inferior tribunals; and here,—although, as already explained (*o*), an adjudication of this kind cannot be impeached by disproving the facts stated in it, not excepting those which are necessary to give jurisdiction,—yet still, the parties against whom it is offered in evidence may establish its invalidity, either by proving any extrinsic facts, which show that the person or court pronouncing it had no authority to enter into the inquiry (*p*), or by pointing out the circumstance, that the adjudication itself does not disclose facts sufficient to give jurisdiction (*q*). Thus, if justices have acted in a matter not regularly before them, as if they should have proceeded to remove a pauper without any complaint being made by the parish officers, this may be shown by evidence, and will be fatal to their order (*r*). So, where a justice had convicted a baker by four separate convictions of selling bread upon the same Sunday, and an action of trespass was brought against him, the court held that he could not rely upon the convictions as a defence, since he had exceeded his authority in imposing more than one penalty for the same day, and, therefore, three of the convictions were of necessity void (*s*). The rule which renders it necessary that the order, on its face, should contain a statement of all facts which are requisite to show jurisdiction, is not confined to orders of justices;

of, the title to any real estate, or interest in lands, tenements or hereditaments;

19. Offences against sections 20, 21, and 22 of 6 & 7 G. 5, c. 50. See section 38.
20. Offences against section 9 of the Night Poaching Act, 1828 (9 G. 4, c. 69);
21. Corrupt practices at Parliamentary, or municipal elections, including elections of county, district, and parish councils, and of boards of guardians (17 & 18 V. c. 102, s. 10; 46 & 47 V. c. 51, s. 53; 47 & 48 V. c. 70, ss. 30, 35, and 36, Sch.; 51 & 52 V. c. 41, s. 75; 56 & 57 V. c. 73, s. 48); or elections in the City of London (47 & 48 V. c. 70, s. 35; 50 & 51 V. c. xiii.); or of Metropolitan borough councils (62 & 63 V. c. 14);
22. Incest (8 Edw. 7, c. 45).
23. Offences against the Official Secrets Act, 1911 (1 & 2 G. 5, c. 28);
24. Offences against section 56 of the Mental Deficiency Act, 1913 (3 & 4 G. 5, c. 28).

(*o*) *Ante*, §§ 1669-1672.

(*p*) *R.* v. *Bolton*, (1841) 1 Q. B. 66; 10 L. J. M. C. 49; 55 R. R. 209; *R.* v. *Somersetshire Justices*, (1826) 5 B. & C. 816; 5 L. J. (O.S.) M. C. 35; cited by *Patteson, J.*, (1842) in *In re Clarke*, 2 Q. B. 634, 635; 11 L. J. Q. B. 75; 57 R. R. 741.

(*q*) *In re Clarke*, *supra*; *ante*, § 147. See *Ayrton* v. *Abbott*, (1849) 14 Q. B. 1; *Bramwell* v. *Penneck*, (1827) 7 B. & C. 536; *Ex p. Bailey* and *Ex p. Collier*, (1854) 3 E. & B. 607; 23 L. J. M. C. 161; 97 R. R. 677; *R.* v. *St. George, Bloomsbury*, (1855) 4 E. & B. 520; 24 L. J. M. C. 49; 99 R. R. 591; *Staverton* v. *Ashburton*, (1855) *id.* 526; 24 L. J. M. C. 53; 99 R. R. 595.

(*r*) *R.* v. *Buckinghamshire Justices*, (1843) 3 Q. B. 807; 12 L. J. M. C. 29; per Ld. Denman, explaining *R.* v. *Bolton*, (1841) 1 Q. B. 66; *Welch* v. *Nash*, (1807) 8 East, 394; 9 R. R. 478.

(*s*) *Crepps* v. *Durden*, (1777) 2 Cowp. 640; recognised by Dallas, C. J., in *Brittain* v. *Kinnaird*, (1819) 1 Br. & B. 430; 21 R. R. 680.

but whenever a special statutory power is exercised whether the order be made by a magistrate or by the Lord Chancellor, the facts which gave the authority must be stated (*t*).

§ 1716. It may be here convenient to furnish a few instances, in which the judicial proceedings of inferior tribunals have been quashed or otherwise treated as nullities, on the ground that they did not set forth sufficient facts to show jurisdiction. In *R.* v. *Hulcott* (*u*), an order of justices discharging a servant from her service was held bad, because it did not state that she was a servant in husbandry; this being a fact upon which their jurisdiction depended, and which it was their duty to ascertain. In *Kite & Lane's Case* (*v*), a conviction was quashed, on an objection that it did not show that the justices were of that district, to the justices of which alone the Act gave jurisdiction. So, where the jurisdiction of the magistrates to take the examination of a soldier depended, under an old Mutiny Act, upon the fact of his being quartered at Southampton; the circumstance that this fact, which the magistrates were bound to have ascertained, was neither stated in the examination, nor proved *aliundè*, rendered the examination inadmissible in evidence (*x*). *In Day* v. King (*y*), the facts that the applicant was a member of a friendly society, that he was entitled to the money, and that the party against whom the application was made was an officer of the society, were held not only to be necessary to give the justices jurisdiction, but to form part of what they had to decide; and as these facts were not mentioned in the order, it was deemed deficient. So, inquisitions have on several occasions been quashed, where it was the duty of the sheriff, or the trustees, before whom they were to be taken, to give certain preliminary notices to the parties interested, and such notices did not appear on the face of the proceedings to have been given (*z*).

§ 1717. It will be observed that, in all the cases just cited, the facts, averments of which were omitted on the face of the proceedings, were preliminary matters cognisable by the authority whence the proceedings emanated; and had not this been the case, it would seem that no objection on the ground of their omission could

(*t*) *Christie* v. *Unwin*, (1840) 11 A. & E. 373, 378, 379; 9 L. J. Q. B. 47, per Ld. Denman and Coleridge, J.

(*u*) (1796) 6 T. R. 583.

(*v*) (1822) 1 B. & C. 101.

(*x*) *R.* v. *All Saints, Southampton*, (1828) 7 B. & C. 785; 6 L. J. (O.S.) M. C. 53; 31 R. R. 296.

(*y*) (1836) 5 A. & E. 359.

(*z*) *R.* v. *Mayor of Liverpool*, (1768) 4 Burr. 2244; *R.* v. *Bagshaw*, (1797) 7 T. R. 363; *R.* v. *Norwich Road Trustees*, (1836) 5 A. & E. 563. See, also, *R.* v. *Worcestershire Justices*, (1854) 3 E. & B. 477; 23 L. J. M. C. 113; 97 R. R. 607; though that case would seem to be overruled by *R.* v. *Harvey*, (1874) L. R. 10 Q. B. 46; 44 L. J. M. C. 1.

have prevailed. At least, this doctrine has been sanctioned, if not established, by Lord Chancellor Cottenham, who, in *Taylor* v. *Clemson* (*a*), intimated a tolerably clear opinion that it could not be necessary in any case that the proceedings of inferior tribunals should contain averments of any facts, into which those tribunals had no authority to inquire, and of which, therefore, they could have no judicial knowledge (*b*).

§ 1718. The case of *Taylor* v. *Clemson* (*c*) is further important, as distinctly deciding, that no judicial proceeding of an inferior tribunal shall be deemed defective, for not stating facts that are necessarily implied from those which are alleged. In that case the circumstances were as follows:—A Railway Act directed that if any landowner should not agree with the company as to the purchase money, or should refuse to accept the sum offered by the company, or should, after notice, neglect to treat, or should not agree with the company for the sale of his interest, the company might issue a warrant to the sheriff to summon a compensation jury. A warrant was issued, purporting to be under the Act, a jury was summoned, and an inquisition recorded which last purported to be taken "pursuant to the Act on the oaths of jurors, duly impanelled in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid, &c." Neither the warrant nor the inquisition stated that the owner had neglected to treat, or had had notice served on him, or had not agreed to sell; and it was consequently contended that these omissions were fatal to the proceedings; but the House of Lords, affirming a decision of the Exchequer Chamber (*d*), held that the warrant and inquisition stated sufficient facts to show the jurisdiction of the sheriff and jury; for the impanelling a jury and the assessment by them, being facts inconsistent with an agreement between the company and the landowner, necessarily implied non-agreement.

§ 1719 (*e*). Again, it is only where the point in issue in the first suit, or other legal proceeding, has been actually determined, that the judgment delivered therein is a bar to a subsequent action. Therefore, if the action has been discontinued or withdrawn (*f*), or

(*a*) (1844) 11 Cl. & F. 647-651; 11 L. J. Ex. 447; 65 R. R. 273, questioning a contrary doctrine suggested by Ld. Mansfield in *R.* v. *Croke*, (1774) 1 Cowp. 30, and by Ld. Denman in *R.* v. *South Holland Drainage*, (1838) 8 A. & E. 437; 8 L. J. Q. B. 64; 47 R. R. 618.

(*b*) See, also, *Ostler* v. *Cooke*, (1849) 13 Q. B. 143; 18 L. J. Q. B. 185; 78 R. R. 323.

(*c*) (1844) 11 Cl. & F. 610; 11 L. J. Ex. 447; 65 R. R. 273.

(*d*) 2 Q. B. 978.

(*e*) Gr. Ev. §§ 529, 530, in some part.

(*f*) R. S. C. Ord. XXVI. r. 1; 3 Bl. Com. 296.

has ended in a judgment of nonsuit, or has been dismissed for want of prosecution (*g*), or if for any other cause (*h*) no final judgment of the court has been pronounced upon the matter in issue, the proceedings are not conclusive (*i*). Though the withdrawal of a juror, or the discharge of a jury, by consent, would seem to constitute no legal defence to a second action (*k*), it is so far regarded as putting a final end to the litigation, that, if the plaintiff were to sue again for the same cause, the court, on the application of the defendant, would stay the proceedings, and make the plaintiff pay the costs incurred (*l*). Further, a judgment is inconclusive if it appears that the decision did not turn upon the merits (*m*); as, for instance, if the trial went off on a technical defect (*n*), or for faults in the pleadings (*o*), or because the action was misconceived (*p*), or because the debt was not then due (*q*), or the like.

§ 1720. In some cases it may be difficult to determine what constitutes a decision upon the merits, and this question has frequently been before the Court of King's Bench, in cases where appeals against orders of removal have been allowed by the Sessions (*r*). Thus much, however, is clear with respect to this particular class of cases, that if the order has been quashed for informality (*s*), or because the pauper was not chargeable (*t*) or removable (*u*) at the time when it

(*g*) *Re Orrell Colliery Co.*, (1879) 12 Ch. D. 681; 48 L. J. Ch. 655; *Joly* v. *Swift*, (1847) 11 Ir. Eq. R. 410.

(*h*) See *Langmead* v. *Maple*, (1865) 18 C. B. (N.S.) 255; 144 R. R. 482.

(*i*) *Knox* v. *Waldoborough*, (1827) 5 Greenl. 185; *Hull* v. *Blake*, (1816) 13 Mass. 155; *Sweigart* v. *Berk*, (1822) 8 Serg. & R. 305; *Bridge* v. *Sumner*, (1823) 1 Pick. 371.

(*k*) *Sanderson* v. *Nestor*, (1826) Ry. & M. 402; *Everett* v. *Youells*, (1832) 2 B. & Ad. 349.

(*l*) *Gibbs* v. *Ralph*, (1845) 14 M. & W. 804; 15 L. J. Ex. 4; 69 R. R. 833. If there be a substantial breach by one of the parties of the terms upon which the juror was withdrawn, the Court has jurisdiction to retry the action: *Thomas* v. *Exeter Flying Post*, (1887) 18 Q. B. D. 822; 56 L. J. Q. B. 313.

(*m*) See *Gillespie* v. *Russel*, (1859) 3 Macq. H. L. 757; *Commissioners of Leith Harbour and Docks* v. *Inspector of Poor*, (1866) L. R. 1 H. L. (Sc.) 17.

(*n*) *Jenkins* v. *Merthyr Tydfil Council*, (1899) 80 L. T. 600; *Lepping* v. *Kedgewin*, (1675) 1 Mod. 207; *Lane* v. *Harrison*, (1820) 6 Munf. 573; *M'Donald* v. *Rainor*, (1811) 8 Johns. 442.

(*o*) *Hitchin* v. *Campbell*, (1772) 2 W. Bl. 831.

(*p*) *Id.*

(*q*) *New England Bank* v. *Lewis*, (1829) 8 Pick. 113.

(*r*) See *R.* v. *Lancashire*, (1843) 3 Q. B. 367; 12 L. J. M. C. 76; *R.* v. *Evenwood Barony*, (1843) *id.* 370; 12 L. J. M. C. 101; *R.* v. *Charlbury*, (1843) *id.* 378; 13 L. J. M. C. 19; *R.* v. *Kingsclere*, (1843) *id.* 388; 13 L. J. M. C. 22; *R.* v. *Perranzabuloe*, (1844) *id.* 400; 13 L. J. M. C. 47; *Ex parte Pontefract*, (1843) *id.* 391; *Ex parte Ackworth*, (1843) *id.* 397; 13 L. J. M. C. 38; *R.* v. *Clint*, (1841) 11 A. & E. 624; 10 L. J. M. C. 151; *R.* v. *St. Mary, Lambeth*, (1845) 7 Q. B. 587; 14 L. J. M. C. 126; *R.* v. *Ellel*, (1845) 7 Q. B. 593.

(*s*) *R.* v. *Penge*, (1793) Nolan's Rep. 176; *R.* v. *Cottingham*, (1834) 2 A. & E. 250; *R.* v. *Great Bolton*, (1845) 7 Q. B. 387.

(*t*) *Osgathorpe* v. *Diseworth*, (1746) 2 Str. 1256; *R.* v. *Wheelock*, (1826) 5 B. & C. 511.

(*u*) *R.* v. *Wick St. Lawrence*, (1833) 5 B. & Ad. 526.

was made, the allowance of the appeal will not preclude the respondent parish from obtaining a second order of removal; and if it does not appear on the face of the former proceedings, that the order of justices was quashed "not on the merits," parol evidence will be admissible to explain the particular ground upon which it was quashed (*v*); although in the absence of such evidence, the court will presume, that the order of Sessions for quashing it was an adjudication upon the settlement (*x*). If the Sessions, in quashing an order of removal, make an entry that it is quashed "not on the merits," this will conclusively prevent the order of Sessions from operating as an estoppel between the parishes; and, consequently, on the hearing of an appeal against a subsequent order respecting the same settlement, the appellants will not be allowed to show that the former order was, in fact, quashed on the merits (*y*). The mere dismissal of an application made to justices out of Sessions is seldom, if ever,—unless the case be governed by some special statute (*z*),—regarded as a final adjudication, so as to operate as a bar to further inquiry (*a*).

§ 1721. It seems almost needless to observe that a party against whom a judgment is offered in evidence, may always defeat its effect by showing that it has been reversed (*b*). This rule applies to all courts alike, and therefore the title of an executor or administrator may be successfully disputed, by proof that the probate or letters have been revoked (*c*). So, if a prisoner has been found guilty upon an indictment, which, on a case reserved for the judges, has been pronounced bad in law, he may again be put upon his trial for the same offence, because he has never yet been in real jeopardy (*d*). It is settled that the *pendency of an appeal* will not prevent the judgment from operating as a bar (*e*). It follows *a fortiori* from this rule, that no objection can be taken to the binding effect of a judgment as evidence, on the ground that the statement of claim is so

(*v*) *R.* v. *Wheelock*, *supra*; *R.* v. *Wick St. Lawrence*, (1833) 5 B. & Ad. 526; 3 L. J. K. B. 12; *R.* v. *Widecombe in the Moor*, (1847) 9 Q. B. 894; 16 L. J. M. C. 44; *R.* v. *Leeds*, (1847) 9 Q. B. 910; 17 L. J. M. C. 1; *R.* v. *Macclesfield*, (1849) 13 Q. B. 881; 19 L. J. M. C. 38.

(*x*) *R.* v. *Wick St. Lawrence*, *supra*; *R.* v. *Yeovelcy*, (1838) 8 A. & E. 806, 818.

(*y*) *R.* v. *St. Anne, Westminster*, (1847) 9 Q. B. 878; 16 L. J. M. C. 41.

(*z*) As to the effect of a dismissal of an information by a court dealing summarily with an indictable offence, see *ante*, § 1615.

(*a*) *R.* v. *Machen*, (1849) 14 Q. B. 74; 18 L. J. M. C. 213; *R.* v. *Hutchins*, (1881) 6 Q. B. D. 300; 50 L. J. M. C. 35. See *post*, § 1757.

(*b*) *Hynde's Case*, (1593) 4 Rep. 71 b, cited in *Doe* v. *Wright*, (1839) 10 A. & E. 775; 50 R. R. 534; *Nowlan* v. *Gibson*, (1847) 12 Ir. L. R. 5; *R.* v. *Drury*, (1849) 3 Car. & K. 193; 18 L. J. M. C. 189; *Wood* v. *Jackson*, (1831) 8 Wend. 9.

(*c*) B. N. P. 247.

(*d*) *R.* v. *Reader*, (1830) 4 C. & P. 245; cited in *R.* v. *Bowman*, (1834) 6 C. & P. 342.

(*e*) *Doe* v. *Wright*, *supra*; *Scott* v. *Pilkington*, (1862) 2 B. & S. 11; 31 L. J. Q. B. 81; 127 R. R. 244.

defective that it would have been adjudged bad had the point of law been raised by the pleading (*f*).

§ 1722. In some few cases the *effect of a judgment will materially vary*, according as it has been pronounced *in favour of the one or the other* party. Thus, while an order of Sessions confirming an order of removal is conclusive against all the world, that the pauper, at the date of the first order, was settled in the parish to which he was sent, an order of Sessions quashing an order of removal is conclusive between the contending parties alone, and that, too, only as to the point which it decides, namely, that at the time when the order of removal was made, the appellant parish was not bound to receive the pauper (*g*). Again, if the inhabitants of a parish be indicted for the non-repair of a road, and be convicted, this will furnish conclusive evidence of their liability to do the repairs, in the event of a subsequent indictment being brought against them; but an acquittal on such an indictment will not establish the non-liability of the defendants, because it might have proceeded on the ground that the road was not out of repair, and thus, the question of liability might not have been decided (*h*). Whether an acquittal on an information *in rem* on the Revenue side of the King's Bench Division will be conclusive proof of the illegality of the seizure as against strangers, in the same way as a judgment of condemnation is conclusive in favour of its legality, may admit of some doubt. Lord Kenyon on one occasion seems to have considered that it was conclusive (*i*), but the point has never been expressly determined; and as an acquittal does not, like a conviction, ascertain any precise fact, but may be occasioned by the laches of the prosecutor, it certainly seems reasonable to contend that strangers should not thereby be conclusively bound (*k*). In *Day* v. *Spread* (*l*), an action was brought in Ireland for necessaries supplied to the defendant's wife, while living separate from her husband. In support of the plaintiff's claim, witnesses were called to prove that the separation was justifiable on the wife's part, as it was owing to the cruel and violent treatment of her husband. In order to rebut this case, and also to prove that the wife had been guilty of adultery, the defendant tendered in evidence a sentence of the Ecclesiastical Court, dismissing a suit instituted by the wife against her husband for a divorce *a mensa et*

(*f*) *Hughes* v. *Blake*, (1818) 1 Mason, 515, 519, per Story, J.

(*g*) *R.* v. *Wick St. Lawrence*, (1833) 5 B. & Ad. 526; 3 L. J. K. B. 12; *Heston* v. *St. Bride*, (1853) 22 L. J. M. C. 65; 1 E. & B. 583; 93 R. R. 298.

(*h*) *R.* v. *St. Pancras*, (1794) Pea. 220, 221; *R.* v. *Haughton*, (1853) 1 E. & B. 501, 514; 22 L. J. M. C. 89; 93 R. R. 264; *R.* v. *Nether Hallam*, (1854) 6 Cox C. C. 435.

(*i*) *Cooke* v. *Sholl*, (1793) 5 T. R. 256.

(*k*) B. N. P. 245; 2 Ph. Ev. 38, 39.

(*l*) (1842) Jebb & B. 163.

thoro on account of cruelty, in which suit the husband had made a counter allegation of adultery. The majority of the judges held, that this evidence was admissible, though Mr. Justice Perrin advanced a contrary opinion; but the whole court considered, that, if received at all, it was entitled to very little weight; whereas, had the Ecclesiastical Court divorced the parties, its sentence would, doubtless, have been conclusive in favour of the plaintiff.

§ 1724. With regard to foreign judgments,—which term includes judgments, decrees, and other adjudications, whether strictly of record or not, emanating from Irish, Scotch, colonial, or foreign tribunals (*m*), —their admissibility and effect in English courts will be found to depend on rules, which in many respects are similar to those that apply to home judgments. For instance, they are always admissible, whether for or against strangers or parties, in proof of their existence (*n*);—they are divisible into judgments *in rem* and judgments *inter partes*, the former being evidence of the facts adjudicated as against all the world, the latter being only admissible for and against parties and privies (*o*);—they furnish no evidence whatever of matters collaterally or incidentally noticed in them, still less of matters to be inferred by argument from them (*p*);—they must, in order to be received, finally determine the points in dispute, and be adjudications upon the actual merits (*q*);—and they are open to be impeached on the ground, either of fraud (*r*) or collusion (*s*), or of want of jurisdiction, whether over the cause, over the subject-matter, or over the parties (*t*).

§ 1725. The subject of *jurisdiction* deserves further notice; and here it may first be observed, that the courts of this country will so

(*m*) *Houlditch* v. *M. of Donegal*, (1834) 2 Cl. & F. 476; 37 R. R. 181; *Ferguson* v. *Mahon*, (1839) 11 A. & E. 179; 9 L. J. Q. B. 146; 52 R. R. 301; *Harris* v. *Saunders*, (1825) 4 B. & C. 411; 3 L. J. (O.S.) K. B. 239; 28 R. R. 310, as to Irish judgments; *Cowan* v. *Braidwood*, (1840) 1 Man. & G. 882; 10 L. J. C. P. 42; 56 R. R. 561; *Russell* v. *Smyth*, (1842) 9 M. & W. 810; 11 L. J. Ex. 308; 60 R. R. 904, as to Scotch judgments; *Henderson* v. *Henderson*, (1848) 6 Q. B. 288; 11 Q. B. 1015; 13 L. J. Q. B. 274; 66 R. R. 384, as to colonial decrees.

(*n*) *Tarleton* v. *Tarleton*, (1815) 4 M. & S. 20; *ante*, § 1667.

(*o*) *Ante*, § 1673.

(*p*) *Ante*, § 1711.

(*q*) *Plummer* v. *Woodbourne*, (1825) 4 B. & C. 625; 4 L. J. (O.S.) K. B. 6; *Smith* v. *Nicolls*, (1839) 5 Bing. N. C. 222; 8 L. J. C. P. 92; 50 R. R. 658; *Sadler* v. *Robins*, (1808) 1 Camp. 253; *Garcias* v. *Ricardo*, (1844) 14 Sim. 265; 65 R. R. 580; *Ricardo* v. *Garcias*, (1845) 12 Cl. & F. 368.

(*r*) *Ochsenbein* v. *Papelier*, (1873) L. R. 8 Ch. 695; 42 L. J. Ch. 861; *Abouloff* v. *Oppenheimer*, (1882) 52 L. J. Q. B. 1; 10 Q. B. D. 295.

(*s*) *Price* v. *Dewhurst*, (1838) 4 Myl. & Cr. 85; 8 L. J. Ch. 57; 42 R. R. 176; *Don* v. *Lippmann*, (1837) 5 Cl. & F. 20; 47 R. R. 1; *Magoun* v. *New England Insurance Co.*, (1840) 1 Story, R. 157; *Bradstreet* v. *Neptune Insurance Co.*, (1838) 3 Sumn. 600.

(*t*) *Price* v. *Dewhurst*, *supra*; *Rose* v. *Himely*, (1808) 4 Cranch, 269.

far presume that a foreign tribunal has acted within the limits of its authority, and that its proceedings are regular, that, if an action be brought upon a foreign judgment, the plaintiff need not allege in his statement of claim, either that the foreign court had jurisdiction over the parties or the cause (*u*), or that the proceedings had been properly conducted (*v*). It seems, however, subject to the power of amendment, to be still necessary for a defendant to state these particulars, when he pleads such judgment by way of estoppel or of justification (*x*). Next, although it will scarcely be expected in a work like the present, that all the cases should be noticed in which foreign judgments have been rejected as having emanated from a court having no jurisdiction, it may be useful to refer to a few leading decisions on the subject. Thus, sentences of foreign *prize* courts have repeatedly been held invalid by English judges, as being pronounced by a court having no jurisdiction, when it appeared that the court had sat in a neutral country under a commission from a belligerent power (*y*); and for this purpose a country has been considered neutral, where its independence was in form only preserved, the belligerent having poured into it such a body of troops as in reality to possess the sovereign authority (*z*).

§ 1726. Again, it is decided that no foreign court has power, so far as any consequences in England are concerned, to annul a *marriage* solemnised in England between persons of English domicile (*a*); unless at the date of the divorce the parties were *bona fide* domiciled in the foreign state (*b*). On this principle it would seem that two American citizens, who were married in America, cannot become validly divorced by a court in Rome merely by going to that city for the purpose of obtaining such a divorce (*c*). It has been suggested, and indeed decided, in several cases both in England and Scotland that *bona fide*

(*u*) *Robertson* v. *Struth*, (1844) 5 Q. B. 941; 64 R. R. 684.

(*v*) *Cowan* v. *Braidwood*, *supra*.

(*x*) *Collett* v. *Ld. Keith*, (1802) 2 East, 260; *General Steam Navigation Co.* v. *Guillou*, (1843) 11 M. & W. 877, 894; 13 L. J. Ex. 168; 63 R. R 807. See *Ricardo* v. *Garcias*, *supra*.

(*y*) *The Flad Oyen*, (1799) 8 T. R. 270, n. by Sir W. Scott; *Havelock* v. *Rockwood*, (1799) 8 T. R. 276. These cases virtually overrule a doubt thrown out by Ld. Kenyon in *Smith* v. *Surridge*, (1801) 4 Esp. 26, 27; 6 R. R. 837.

(*z*) *Donaldson* v. *Thompson*, (1808) 1 Camp. 429; 10 R. R. 717, per Ld. Ellenborough.

(*a*) *Shaw* v. *Att.-Gen.*, (1870) L. R. 2 P. & D. 156; 39 L. J. P. & M. 81; *R.* v. *Lolley*, (1812) R. & R. 237; 15 R. R. 737; *Briggs* v. *Briggs*, (1880) 5 P. D. 163; 49 L. J. P. & M. 38; *Tovey* v. *Lindsay*, (1813) 1 Dow. 117; 14 R. R. 19; *In re Wilson's Trusts*, (1865) L. R. 1 Eq. 247; 35 L. J. Ch. 243.

(*b*) *Conway* v. *Beazley*, (1831) 3 Hag. Ecc. 639, 645—647, 653; *Tollemache* v. *Tollemache*, (1861) 30 L. J. P. & M. 113; *Robins* v. *Dolphin*, (1858) 27 L. J. Pr. & Mat. 24; 1 Sw. & Tr. 37; *Dolphin* v. *Robins*, (1859) 29 L. J. Pr. & Mat. 11; 7. H. L. C. 390; *Shaw* v. *Gould*, (1868) L. R. 3 H. L. 55; *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60; 37 L. J. Ch. 433.

(*c*) See this discussed in *Connelly* v. *Connelly*, (1850) 2 Rob. 202; 83 R. R. 70.

residence of the spouses, as apart from actual domicile is sufficient to give the local court jurisdiction to dissolve a marriage wheresoever contracted; it seems, however, to be now clear that nothing short of absolute *bona fide* domicile is sufficient for the purpose (*d*); there are, however, other remedies for matrimonial misconduct, short of dissolution, such as judicial separation, which may be administered by the courts of the country in which spouses, domiciled elsewhere, are for the time resident (*e*). Domicile, however, would seem always to confer jurisdiction over parties (*f*). Therefore if parties, domiciled in Scotland, be married in England, they may legally be divorced by a Scotch court; and such divorce will be recognised as valid in England, though the woman prior to the wedding may have been an English subject, and the grounds on which her divorce rested may have been such as in England would not justify the dissolution of the nuptials (*g*). Apparently a divorce by the tribunals of any country in which the parties are domiciled would be good (*h*). Whether the judgment of a foreign country on the validity of a marriage, which has been celebrated, either within its territories between parties who are not subjects of that country, or beyond its territories between parties, one or both of whom are natives of some other foreign state, would be binding upon our courts, is also an undetermined and difficult question, which depends upon principles of international law respecting jurisdiction, that are not yet definitely settled (*i*). On principle, however, it seems clear, that such a judgment should be either wholly inadmissible, or conclusive, in our courts, according as it should appear to have been pronounced by a tribunal not having, or having, jurisdiction over the subject-matter (*k*).

(*d*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517; 64 L. J. P. C. 97, in which all the previous cases were reviewed by the Privy Council. See, also, *Armytage* v. *Armytage*, [1898] P. 178; *Bater* v. *Bater*, *supra*.

(*e*) See *Le Mesurier* v. *Le Mesurier*, *supra*; *Armytage* v. *Armytage*, *supra*.

(*f*) The domicile of the husband will always give jurisdiction to the courts of the country in which it exists to dissolve a marriage. The domicile of the wife, as a rule, necessarily follows, and is the same as that of her husband. But after a judicial separation between the husband and wife has been formally pronounced, the wife becomes capable of acquiring a separate domicile for herself: *Dolphin* v. *Robins*, (1859) 7 H. L. C. 390; 29 L. J. P. 11; 115 R. R. 210; *Le Sueur* v. *Le Sueur*, (1876) 1 P. D. 139; 45 L. J. P. D. & A. 79. But whether a separation by mutual consent, even for a long period, is sufficient to enable the wife to acquire a separate domicile is not clear: see *Re Daly's Settlement*, (1858) 25 Beav. 456; 25 L. J. Ch. 751; 119 R. R. 489; *Dolphin* v. *Robins*, *supra*; *Tovey* v. *Lindsay*, (1813)1 Dow. 117; 14 R. R. 19; *Le Sueur* v. *Le Sueur*, *supra*; *Armytage* v. *Armytage*, *supra*; *Stathatos* v. *Stathatos*, [1913] P. 46; 82 L. J. P. 34; *de Montaign* v. *de Montaign*, [1913] P. 154; 82 L. J. P. 125.

(*g*) *Harvey* v. *Farnie*, (1880) 5 P. D. 153; aff. 6 P. D. 35; 50 L. J. P. 17, and 8 App. Cas. 43; 52 L. J. Pr. & D. 33. See *Warrender* v. *Warrender*, (1834) 9 Bligh. N. S. 89; 37 R. R. 188; and *Geils* v. *Geils*, (1852) 1 Macq. H. L. 36, 255.

(*h*) See *Ryan* v. *Ryan*, (1816) 2 Phillim. 332.

(*i*) *Sinclair* v. *Sinclair*, (1798) 1 Hag. Cons. 297. See *Connelly* v. *Connelly*, *supra*.

(*k*) See *Doglioni* v. *Crespin*, (1866) L. R. 1 H. L. 301; 35 L. J. P. & M. 129.

§ 1727. With respect to judgments *inter partes*, a doubt has been entertained as to whether a foreign court can exercise any jurisdiction over *real property* situate in another country. It clearly cannot do so immediately, because its judgment cannot directly bind the land (*l*); and, consequently, where the Court of Chancery in Ireland, after verdict upon an issue *devisavit vel non*, had decreed that the instrument set up as a will was not an operative devise of certain Irish estates, it was held that this decree could not be pleaded in bar to a suit between the same parties in the Court of Chancery in England, which had been instituted by the devisee for the purpose of establishing the will, so far as it related to some English property (*m*). Still, a foreign court may, as it seems, indirectly, affect land in this country by acting *in personam*, that is, through the medium of its power over the person entitled to the property; and therefore, if an Irish, colonial, or foreign court were, by a valid decree, to appoint a receiver in this country, the party, on whose behalf the appointment was made, might probably, by action in the Chancery Division, get his foreign decree carried into execution. At least, the converse of the above rule was decided in the House of Lords (*n*).

§ 1728. Questions of jurisdiction have also frequently arisen, where the party, seeking to avoid the effect of a foreign judgment, has pleaded, with more or less particularity, that he was not, at the time of the proceedings against him, either resident within the territories of the foreign state, or the subject of such state (*o*); and here the rules, as far as they can be collected from the cases, appear to be these: first, that the statement of defence must contain every allegation which is necessary to render the judgment invalid, and must, in short, be good *in omnibus* (*p*); and next, that among the necessary allegations must be included averments, that the defendant was not a subject of the foreign state, or resident, or even present, in it, at the time when the proceedings were instituted, so that he could not be bound, by reason of allegiance, or domicile, or temporary presence, by the decision of its courts (*q*).

(*l*) *Burnham* v. *Webster*, (1846) 1 Woodb. & M. 176.

(*m*) *Boyse* v. *Colclough*, (1854) 1 K. & J. 124; 103 R. R. 44.

(*n*) *Houlditch* v. *Donegal*, (1834) 8 Bligh, N. S. 301, 343—345; 37 R. R. 181, per Ld. Brougham.

(*o*) *Sirdar Gurdyal Singh* v. *Faridkote*, [1894] A. C. 670. The parties may, however, by agreement, give to the foreign court jurisdiction which it would not otherwise have had; *Feyerick* v. *Hubbard*, [1902] 71 L. J. K. B. 278. See, also, *Emanuel* v. *Symon*, [1908] 1 K. B. 302; 77 L. J. K. B. 180.

(*p*) *Cowan* v. *Braidwood*, (1840) 1 Man. & G. 882; 10 L. J. C. P. 42; 56 R. R. 561; *Becquet* v. *MacCarthy*, (1831) 2 B. & Ad. 951; 36 R. R. 803; explained in *Don* v. *Lippmann*, (1837) 5 Cl. & F. 21; 47 R. R. 1; *Maubourquet* v. *Wyse*, (1867) I. R. 1 C. L. 471.

(*q*) *General Steam Navigation Co.* v. *Guillon*, (1843) 11 M. & W. 894; 13 L. J. Ex. 168; 63 R. R. 807; *Cowan* v. *Braidwood*, *supra*; *Russell* v. *Smyth*, (1842)

§ 1729. Besides the rules already stated (*r*), which are common to foreign and domestic judgments, others may be cited, which, if not exclusively applicable to foreign adjudications, are at least far more frequently applied to them than to the decisions of our own courts. For instance, if it be apparent upon the face of the proceedings, or can be made so by extrinsic proof, that a foreign judgment is contrary to the law of nations (*s*), or is repugnant to natural justice (*t*), or is founded on a mistaken notion of the Court's jurisdiction (*u*), or is obviously or admittedly (*v*) opposed to the law of the country where it was pronounced (*x*), or is so grossly defective as to render it doubtful what point, if any, was actually determined (*y*), or is manifestly erroneous, as professing to be made upon particular grounds, which plainly do not warrant the decision (*z*), its effect as evidence will be wholly neutralised. A mere irregularity of procedure on the part of the foreign court, however, is no ground for impeaching the judgment in this country (*a*).

§ 1730. In stating that foreign judgments, when *repugnant to natural justice*, will be disregarded in English courts, vague language is undoubtedly used; but *Price* v. *Dewhurst* (*b*) may be cited as an example. In that case a judgment pronounced in the Danish island of St. Croix was disregarded in our courts, it appearing that one of

9 M. & W. 810; 11 L. J. Ex. 308; 60 R. R. 904; *Reynolds* v. *Fenton*, (1846) 3 C. B. 187; 16 L. J. C. P. 15; 71 R. R. 315; *Rousillon* v. *Rousillon*, (1880) 14 Ch. D. 351; 49 L. J. Ch. 338.

(*r*) *Ante*, § 1724.

(*s*) *Baring* v. *Clagett*, (1802) 3 Bos. & P. 215; 6 R. R. 759; *Wolff* v. *Oxholm*, (1817) 6 M. & S. 92; 18 R. R. 313; *Simpson* v. *Fogo*, (1862) 1 J. & H. 18; 32 L. J. Ch. 249; and 1 H. & M. 195; 136 R. R. 90, in a subsequent stage.

(*t*) *Ferguson* v. *Mahon*, (1839) 11 A. & E. 181; 9 L. J. Q. B. 146; 52 R. R. 301, citing *Becquet* v. *MacCarthy*, *supra*; *Henderson* v. *Henderson*, (1844) 6 Q. B. 298; 13 L. J. Q. B. 274; 66 R. R. 384; *Buchanan* v. *Rucker*, (1808) 9 East, 192; 9 R. R. 531; *Cowan* v. *Braidwood*, *supra*; *Sims* v. *Thomas*, (1841) 3 Ir. L. R. 417; *Messina* v. *Petrococchino*, (1872) L. R. 4 P. C. 144; 41 L. J. P. C. 27.

(*u*) *Schibsby* v. *Westenholz*, (1870) L. R. 6 Q. B. 155; 40 L. J. Q. B. 73; *Novelli* v. *Rossi*, (1831) 9 L. J. K. B. 307 (O.S); 36 R. R. 736; as explained in *Castrique* v. *Imrie*, (1870) L. R. 4 H. L. 414; 39 L. J. C. P. 358, per Blackburn, J., in answer to the House of Lords. See, also, *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139; 40 L. J. Q. B. 62, where the court held that a foreign judgment could not be impugned on the ground that it proceeded on a mistake as to English law.

(*v*) *Meyer* v. *Ralli*, (1876) 1 C. P. D. 358; 45 L. J. C. P. 741.

(*x*) *Sims* v. *Thomas*, (1841) 3 Ir. L. R. 415.

(*y*) *Obicini* v. *Bligh*, (1832) 8 Bing. 335; 1 L. J. C. P. 99; 34 R. R. 730.

(*z*) *Calvert* v. *Bovill*, (1798) 7 T. R. 523; 4 R. R. 517; *Pollard* v. *Bell*, (1800) 8 T. R. 434; 5 R. R. 404; *Reimers* v. *Druce*, (1857) 23 Beav. 145, 150, 154; 93 R. R. 76; *Simpson* v. *Fogo*, *supra*; *Messina* v. *Petrococchino*, *supra*.

(*a*) *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L. J. Ch. 281; and this, apparently, even though it may render the judgment void in the country where it was pronounced: per Lindley, M.R., at p. 790. See also *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60.

(*b*) (1838) 4 Myl. & Cr. 76, 85; 8 L. J. Ch. 57; 42 R. R. 176. See *Grand Junction Canal Co.* v. *Dimes*, (1850) 2 Mac. & G. 285; 16 L. J. Ch. 148; 74 R. R. 107.

the litigating parties had himself acted as the judge, and had decided the question in dispute in his own favour. So, it has several times been held, both in England and America, that a defendant may defeat the effect of a foreign judgment by pleading and proving, that in the court from which it proceeded no suit can be instituted without issuing process, and yet that he was never arrested, or served with, or had notice or knowledge of, any process at the suit of the plaintiff for the cause of action upon which the judgment was recovered, and that he had never appeared thereto; for the common justice of all nations requires that no condemnation should be pronounced behind the back of a man (*c*), who has had no opportunity to appear and defend his interest, either personally or by his proper representatives (*d*). But our courts will not hold a foreign judgment to be contrary to natural

(*c*) Where a man had been expelled from a club without being heard in his own defence, the court, considering that the committee of the club had been exercising quasi-judicial functions improperly, declared their resolution void, and granted an injunction: *Fisher* v. *Keane*, (1880) 11 Ch. D. 353; 49 L. J. Ch. 11. See, also, *Dawkins* v. *Antrobus*, (1879) 17 Ch. D. 645.

(*d*) *Ferguson* v. *Mahon*, (1839) 11 A. & E. 179; 9 L. J. Q. B. 146; 52 R. R. 301; *Buchanan* v. *Rucker*, (1808) 9 East, 192; 9 R. R. 531; *Cavan* v. *Stewart*, (1816) 1 Stark. 525; *Houlditch* v. *Donegal*, (1834) 8 Bligh, N. S. 338, 339; 37 R. R. 181; *R.* v. *Archbishop of Canterbury*, (1859) 28 L. J. Q. B. 154, 159; *Vallée* v. *Dumerque*, (1849) 4 Ex. 290; 18 L. J. Ex. 398; 80 R. R. 556; *In re Brook & Delcomyn*, (1864) 16 C. B. (N.S.) 403; 33 L. J. C. P. 246; *Copin* v. *Adamson*, (1875) 45 L. J. Ex. 15; 1 Ex. D. 17; Story, Confl. § 592; *Sawyer* v. *Maine Fire & Marine Insurance Co.*, (1815) 12 Mass. 291; *Bradstreet* v. *Neptune Insurance Co.*, (1839) 3 Sumn. 600; *Magoun* v. *New England Insurance Co.*, (1840) 1 Story, R. 157; *Rangeloy* v. *Webster*, (1840) 11 New Hamp. 299, recognised in *Burnham* v. *Webster*, (1846) 1 Woodb. & M. 178. In *Dr. Bentley's Case*, (1736) 1 Str. 557, Fortescue, J., refers to a very old precedent in support of this doctrine. "I have heard it observed by a very learned man," says he, "that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." The above passage appears to be in favour with the judges. It was cited by Maule, J., in *Abley* v. *Dale*, (1850) 10 C. B. 71, 72; by Byles, J., in *Cooper* v. *Wandsworth Board of Works*, (1863) 32 L. J. C. P. 188; 135 R. R. 643; 14 C. B. (N.S.) 195; and by Scrutton, J., in *Power* v. *Great Eastern Railway*, (1915). The author pointed out that it is an authority not strictly in point; for though our first parents were certainly asked what they had to say why judgment should not pass against them, the same question was as certainly not put to the serpent; and as he was at that time endowed with miraculous powers of speech, it seemed strange that, before he was "cursed above all cattle," and was sentenced to "go upon his belly, and eat dust," he was not asked whether he had really "beguiled Eve," and if so, for what cause. The Editor of the 10th edition added that the passage was neither "strictly in point," nor even at all apposite, because as the Fathers pointed out centuries ago (see, *e.g.*, St. Irenæus, A.D. 176, Adv. Haer. lib. iii., cap. XXXV., § 2), while a human tribunal only acts upon an accumulation of evidence, and even after it has acquired this, only acquires a knowledge which is but imperfect and uncertain, the Divine Tribunal possesses an absolute, complete, and infallible knowledge; so that God, being omniscient, put His questions to our first parents, not to obtain knowledge, but for their own sakes, and in order that they, by urging how they had been "beguiled," might obtain the promise of the Redemption; but did not question the serpent, because He knew the latter to possess no excuse, and to have transgressed deliberately and wilfully.

justice where the foreign court has jurisdiction over the subject-matter of the suit, and the parties thereto, and where the parties have duly and in accordance with English ideas of natural justice been summoned to the foreign court so as to have had a hearing or an opportunity of being heard (*e*).

§ 1731. The defendant, however, in framing such a statement of defence, must carefully negative every combination of facts on which the judgment can be supported; and therefore, if he merely deny that he has had notice of any process, and do not allege, that without process the suit in a foreign court would be a nullity, his statement will be bad in point of law; unless, perhaps, in the event of its containing a distinct averment, that he has had no notice or knowledge whatever of the suit (*f*). In *Ferguson* v. *Mahon* (*g*), the plea, indeed, was held good, though it merely denied a notice of process; but that case, which was an action on an Irish judgment, can only be sustained, if at all (*h*), on the ground that an English Court will judicially recognise the fact that an action must be commenced by process in Ireland (*i*).

§ 1732. The most difficult point connected with foreign judgments is, to determine when they are *conclusive*, and when they are merely *prima facie* evidence of the facts adjudicated by them; and here it will be convenient to consider the subject as it relates, first, to judgments *in rem*; next, to judgments *inter partes*, when they are set up by way of defence to a suit in a domestic tribunal; and lastly, to such judgments, when they are sought to be enforced in our own courts against the original defendant, or his estate.

§ 1733. And first, as to *foreign judgments in rem*. The most important of these are the sentences of condemnation by foreign Courts of Admiralty on questions of *prize*; and here, although Lord Thurlow and Lord Ellenborough were wont to say that the practice of receiving them at all in evidence rested upon an overstrained comity, and was often productive of cruel injustice (*k*), it is now too late to dispute the rule, that, provided such sentences are not impeachable upon some one of the grounds before stated (*l*), they will

(*e*) *Robinson* v. *Fenner*, [1913] 3 K. B. 835; 83 L. J. K. B. 81.

(*f*) *Reynolds* v. *Fenton*, (1846) 3 C. B. 187; 16 L. J. C. P. 15; 71 R. R. 315; *Sheehy* v. *Professional Life Assurance Co.*, (1853) 13 C. B. 787; 22 L. J. C. P. 244; 93 R. R. 740; *Maubourquet* v. *Wyse*, (1867) I. R., 1 C. L. 471.

(*g*) (1839) 11 A. & E. 179; 3 P. & D. 143, S. C.; 9 L. J. Q. B. 146; 52 R. R. 301.

(*h*) *Sheehy* v. *Professional Life Assurance Co.*, *supra*.

(*i*) *Reynolds* v. *Fenton*, *supra*.

(*k*) *Fisher* v. *Ogle*, (1808) 1 Camp. 419, 420; *Donaldson* v. *Thompson*, (1808) *id.* 432; 10 R. R. 717.

(*l*) *Ante*, §§ 1724, 1725, 1729.

be conclusive against all persons, and in all countries, as to the fact upon which the condemnation proceeded, where such fact is stated on the face of the sentence, free from ambiguity (*m*). At the same time it is equally clear, that the ground of condemnation may still be contested in an English court of law, when the language of the sentence, by setting out several reasons for the judgment, leaves it uncertain whether the ship was condemned upon a ground which would warrant its condemnation by the law of nations, or upon another ground, which amounts only to a breach of the municipal regulations of the condemning country (*n*).

§ 1734. Whether a sentence, which, without stating any ground of decision, should condemn a vessel as lawful prize, would be conclusively presumed to have been pronounced on some just ground, is a question of doubt. Lord Mansfield, and several other eminent judges of the last century, entertained an opinion in favour of its conclusive character (*o*); but this doctrine has since been much shaken; and in a case of some importance Chief Justice Tindal has not hesitated to declare, that, in order to bind strangers, the ground of the decision must appear clearly upon the face of the sentence, and that it will not suffice for it to be collected by inference only (*p*). Perhaps, the safest rule on the subject would amount to no more than this; that if, in an action upon a policy of insurance containing a warranty of neutrality, the underwriter were to rely upon a general sentence of condemnation, the assured might still show that in fact the judgment had proceeded upon some ground other than that of an infraction of neutrality (*q*); although, in the absence of such proof, the court would certainly feel bound to pronounce that the ship was condemned as enemies' property (*r*).

(*m*) *Dalgleish* v. *Hodgson*, (1831) 7 Bing. 504; 33 R. R. 504; *Bolton* v. *Gladstone*, (1804) 5 East, 160; *Lothian* v. *Henderson*, (1803) 3 B. & P. 499, 517; 7 R. R. 829; *Kindersley* v. *Chase*, 2 Park, Ins. 743—753. See *Cammell* v. *Sewell*, (1860) 5 H. & N. 742; 29 L. J. Ex. 350; 120 R. R. 799.

(*n*) *Dalgleish* v. *Hodgson*, (1831) 7 Bing. 495, 504; 9 L. J. (O.S.) C. P. 138; 33 R. R. 546; *Hobbs* v. *Henning*, (1864) 17 C. B. (N.S.) 791; 34 L. J. C. P. 117; 142 R. R. 629; *Bernardi* v. *Motteux*, (1781) 2 Doug. 575; *Calvert* v. *Bovill*, (1798) 7 T. R. 523; 4 R. R. 517; *Baring* v. *Clagett*, (1802) 3 Bos. & P. 215; 6 R. R. 759.

(*o*) *Saloucci* v. *Woodmass*, 2 Park, Ins. 727, per Ld. Mansfield; recognised by Ld. Alvanley in *Baring* v. *Clagett*, *supra*; and by Lawrence, J., in *Lothian* v. *Henderson*, *supra*; *Pollard* v. *Bell*, (1800) 8 T. R. 438; 5 R. R. 404, per Grose, J.; 444, per Le Blanc, J.

(*p*) *Dalgleish* v. *Hodgson*, *supra*; *Fisher* v. *Ogle*, *supra*.

(*q*) *Calvert* v. *Bovill*, *supra*.

(*r*) For American authorities respecting proceedings *in rem* in foreign courts of Admiralty, see *Croudson* v. *Leonard*, (1808) 4 Cranch 434; *Williams* v. *Armroyd*, (1813) 7 Cranch 423; *Hudson* v. *Guestier*, (1848) 4 Cranch 293; *The Mary*, (1815) 9 Cranch 126, 142—146; *Bradstreet* v. *Neptune Insurance Co.*, (1839) 3 Sumn. 600; *Grant* v. *M'Lachlin*, (1809) 4 Johns. 34; *Burnham* v. *Webster*, (1846) 1 Woodb. & M. 176.

§ 1735. Another important class of foreign judgments *in rem* consists of sentences concerning *marriage*, and sentences of *divorce* (*s*). These, when pronounced in the country where the marriage was solemnised, and the parties are domiciled, will be regarded in the courts of England as conclusive of the facts adjudicated (*t*), unless they be open to some of the objections before stated (*u*); for otherwise, as Lord Hardwicke once observed, "the rights of mankind would be very precarious." (*v*).

§ 1736. Foreign jurists strongly contend, that a similar doctrine should prevail in favour of all judgments *in rem*; and, consequently, that the decree of a foreign court, declaring the status of a person, and placing him, as an idiot, or a minor, or a prodigal, under guardianship, should be deemed of universal authority and obligation. So it doubtless would be deemed, in regard to all acts done within the territories of the sovereign whose tribunal pronounced the sentence. But, in this country, as also in America, the rights and powers of guardians are considered as strictly local; and no guardian is here admitted to have any right to receive the profits, or to assume the possession, of the real estate of his ward, or to control his person, or to maintain any action for his personalty, without having received a due appointment from the proper English authority (*x*).

§ 1737. The decisions of foreign courts of *bankruptcy* and *insolvency* may be placed in the same category with decrees appointing guardians; and, therefore, although the discharge of a debtor under the bankrupt or insolvent laws of a foreign State will so far be recognised in this country, that it will be held of binding authority with respect to all contracts made in such State, it cannot be here

(*s*) The whole subject of foreign divorce is ably discussed in Story, Confl. §§ 200—230b.

(*t*) *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517; 64 L. J. P. C. 97; *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60.

(*u*) *Ante*, §§ 1724, 1725, 1729. As to which, however, see *Bater* v. *Bater*, *supra*, a careful consideration of which will show how much more restricted such exceptions really are than was formerly supposed.

(*v*) *Roach* v. *Garvan*, (1748) 1 Ves. Sen. 159; *Ex. p. Cottington*, (1678) 2 Swans. 326, n.; cited in *Boucher* v. *Lawson*, Cas. Hsrd. 9; *Sinclair* v. *Sinclair*, (1798) 1 Hag. Cons. 297.

(*x*) *Dawson* v. *Jay*, (1854) 2 Sm. & G. 199; 97 R. R. 165; *Ex. p. Watkins*, (1752) 2 Ves. Sen. 470a; Story, Confl. §§ 499, 504, 504a, 594; *Morrell* v. *Dickey*, (1814) 1 Johns. Ch. R. 153; *Kraft* v. *Wickey*, (1832) 4 Gill & J. 332, 340, 341. See, however, *Grimwood* v. *Bartels*, (1877) 46 L. J. Ch. 788, where Hall, V.-C., allowed a foreign *curator ad bona* of a lunatic to receive the income derivable from the lunatic's real estate in this country, though he would not allow the estate itself to be conveyed to him. See, also, *In re Garnier*, (1872) L. R. 13 Eq. 532; 41 L. J. Ch. 119; and *Scott* v. *Bentley*, (1855) 24 L. J. Ch. 244; 1 K. & J. 281; 103 R. R. 82, where Wood, V.-C.,—apparently misled by an erroneous reference, see 46 L. J. Ch. 789,—held, that a *curator bonis* of a lunatic's estate appointed by a Scotch court might sue in England for debts due to the lunatic. Therefore *quære*.

pleaded in bar to any action, which is brought on a contract made or to be performed elsewhere (*y*). A foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England (*z*).

§ 1738. With regard to *executors* and *administrators*; it is now clearly established, that, in order to sue or be sued in any court of England, in respect of the rights or property of a testator or intestate, the plaintiff (*a*), or defendant (*b*), as the case may be, must have obtained a probate, or letters of administration, in the proper court of this country. A foreign or colonial probate or letters, granted by the court of the country where the deceased was domiciled, may be brought under the notice of the English Court of Probate, with the view of inducing that tribunal to clothe the foreign executor or administrator with proper English powers (*c*); but until he be so clothed, he cannot sue in this country; and when he is so clothed, he may sue without showing, in addition to his English title, that any probate or letters have been granted to him by the foreign court (*d*). If, indeed, an executor or administrator, under a valid foreign probate or grant, has received a debt due to the deceased in the foreign country, and given a release for it, this will be a bar to any demand against the debtor on the part of an executor or administrator appointed in England; and to this extent, and for this purpose only (*e*), the English tribunals will recognise and give effect to foreign probates and grants (*f*).

§ 1739. Next, as to foreign *judgments inter partes*, when they are set up by way of *defence* to an action in a domestic court. Such a judgment, when pronounced *adversely* to the party who brings the second action, will be conclusively binding upon him, provided it be properly pleaded by way of estoppel (*g*). But the statement of

(*y*) *Towne* v. *Smith*, (1845) 1 Woodb. & M. 115, where this question is very fully discussed by Woodbury, J.

(*z*) *Galbraith* v. *Grimshaw*, [1910] A. C. 508; 79 L. J. K. B. 1011.

(*a*) *Whyte* v. *Rose*, (1842) 3 Q. B. 507; 61 R. R. 275, per Tindal, C. J., pronouncing the judgment of Ex. Ch.; *Spratt* v. *Harris*, (1833) 4 Hag. Ecc. 405; *Price* v. *Dewhurst*, (1838) 4 Myl. & Cr. 80—82; 8 L. J. Ch. 57; 42 R. R. 176, per Ld. Cottenham; *Lasseur* v. *Tyrconnel*, (1846) 10 Beav. 28. But see *M'Mahon* v. *Rawlings*, (1848) 16 Sim. 429. See, also, *Vanquelin* v. *Bouard*, (1863) 15 C. B. (N.S.) 341; 33 L. J. C. P. 78; 137 R. R. 540.

(*b*) *Silver* v. *Stein*, (1852) 21 L. J. Ch. 312, per Kindersley, V.-C.

(*c*) *Price* v. *Dewhurst*, *supra*; *Enokin* v. *Wylie*, (1862) 10 H. L. C. 1; 31 L. J. Ch. 402; 138 R. R. 1; *Miller* v. *James*, (1872) L. R. 3 P. & D. 4; *Limehouse Board of Works*, *ex parte Vallance*, (1883) 24 Ch. D. 177; 42 L. J. P. & M. 21.

(*d*) *Whyte* v. *Rose*, *supra*; *Carter & Crost's Case*, (1585) Godb. 33.

(*e*) See *Tighe* v. *Tighe*, (1877) I. R. 11 Eq. 203; *Lightfoot* v. *Bickley*, (1830) 2 Rawle 431; Story, Confl. § 522.

(*f*) *Daniel* v. *Luker*, (1571) 3 Dyer, 305a, pl. 58; recognised and explained in *Whyte* v. *Rose*, *supra*.

(*g*) *Philips* v. *Hunter*, (1795) 2 H. Bl. 410; *Plummer* v. *Woodburne*, (1825) 4 B. & C. 625; 4 L. J. (O.S.) K. B. 6; *Ricardo* v. *Garcias*, (1845) 12 Cl. & F. 368.

defence requires to be carefully drawn; for, although it need not set forth the proceedings and judgment at length (*h*), yet, if it contain no averment that the plaintiff was, at the commencement of the foreign suit, subject to the jurisdiction of the foreign country, by reason of allegiance, domicile, or temporary presence (*i*); or that the foreign court had jurisdiction over the subject-matter of the suit; or that, by the law of the foreign country, the judgment recovered was final and conclusive, so as to be an absolute bar to a fresh action (*k*); or that the matters in issue in the foreign court were identical with those sought to be put in issue in the present suit (*l*);—in any of these cases, the statement will be exposed to the risk of being held bad if the point of law be duly raised by the plaintiff's reply. Should the defendant, instead of pleading the judgment, content himself with putting it in evidence, it will then,—like a domestic judgment under similar circumstances,—be merely cogent, but not conclusive, evidence in his behalf (*m*).

§ 1740. But now, let it be assumed, that the foreign judgment was pronounced *in favour* of the party who brings the second suit. Can the defendant avail himself of such judgment as a defence, where the plaintiff's statement of claim rests on the original cause of action? Clearly he cannot, because the nature of the debt or damage sought to be recovered has not been changed; the plaintiff has no higher remedy in consequence of the foreign judgment, and he cannot issue immediate execution upon it in this country (*n*), but can only enforce it by bringing a fresh action (*o*). If, indeed, the foreign judgment has not only been recovered, but has had satisfaction entered up, it will then be conclusive in favour of the defendant, if properly pleaded (*p*), and this is so, even although the plaintiff may have recovered judgment in the foreign action for a sum smaller than that which he claimed in the foreign action, and smaller than that claimed by him in the subsequent action in England, so long as the cause of action is the same (*q*). It may here be added, that if a man has been tried and acquitted in a foreign country by a court having competent jurisdiction, he may plead and prove such acquittal in bar of any indictment preferred against him in this country for the same offence (*r*).

(*h*) *Ricardo* v. *Garcias*, *supra*.

(*i*) *General Steam Navigation Co.* v. *Guillon*, (1843) 11 M. & W. 877, 894; 13 L. J. Ex. 168; 63 R. R. 807.

(*k*) *Plummer* v. *Woodburne*, *supra*; *Frayers* v. *Worms*, (1861) 10 C. B. (N.S.) 149; 128 R. R. 652.

(*l*) *Ricardo* v. *Garcias*, *supra*.

(*m*) *Ante*, §§ 91, 1673.

(*n*) *Hall* v. *Odber*, (1809) 11 East, 118; 10 R. R. 443.

(*o*) *Smith* v. *Nicolls*, (1839) 5 Bing. N. C. 208, 220, 221; 8 L. J. C. P. 92; 50 R. R. 658; *Wilson* v. *Lady Dunsany*, (1854) 18 Beav. 293.

(*p*) *Barber* v. *Lamb*, (1860) 29 L. J. C. P. 234; 8 C. B. (N.S.) 95; 125 R. R. 590.

(*q*) *Taylor* v. *Holland*, [1902] 1 K. B. 676; 71 L. J. K. B. 278.

(*r*) *R.* v. *Roche*, (1775) 1 Lea. 134.

§ 1741. When a foreign judgment *inter partes* is *sought to be enforced by an action* in a domestic tribunal, it matters not whether it has emanated from a court of record, or not of record, from a superior or inferior court, from a court of common law, or from one exercising equitable jurisdiction (if and so far as foreign tribunals lend themselves to such a classification); but in all cases alike, provided a clear balance has been ascertained, and a final (*s*) decision on the merits has been *bona fide* pronounced by a tribunal of competent authority, the successful party may maintain an action upon such foreign judgment in the King's Bench Division of the High Court for the recovery of the amount so decided to be due to him (*t*). Even costs awarded by a decreet of the Court of Session in Scotland in a suit for a divorce, have been recovered by an action brought against the defendant while resident in this country (*u*); and in conformity with this decision it seems that, were litigation to arise in France relating to real property, and were costs to be given against a party who should afterwards come to this country, an action for such costs might here be maintained (*v*). Before the Judicature Act the decrees of foreign courts of equity might, indeed, in some instances, not be enforceable in the English Common Law Courts, because they might involve collateral and provisional matters, to which such court could not conveniently give full effect; but even then the Court of Chancery would entertain an action founded on such a foreign decree, for the purpose of giving effect to it in regard to English property (*x*), and since the Judicature Act the choice of the particular division of the High Court is merely concerned with comparative convenience of machinery, both divisions of the High Court being equal in point of legal competence to afford relief. So much, then, as to the subject-matter of foreign judgments which may be enforced in this country. No action will lie upon a foreign judgment which is on the face of it defective (*y*). But, on the other hand, in an action in this country upon a judgment of a foreign court, it seems probable (*z*) that the English courts will not entertain a defence which could have been set up in such foreign court but was

(*s*) If the decree or judgment be not final, the action upon it is not maintainable, *Patrick* v. *Shedden*, (1853) 2 E. & B. 14; 22 L. J. Q. B. 283; 95 R. R. 402; *Paul* v. *Roy*, (1852) 21 L. J. Ch. 361; 15 Beav. 433; 92 R. R. 497.

(*t*) *Henderson* v. *Henderson*, (1844) 6 Q. B. 288; 13 L. J. Q. B. 274; 66 R. R. 384; *Sadler* v. *Robins*, (1807) 1 Camp. 255, 256; *Henley* v. *Soper*, (1828) 8 B. & C. 16; 6 L. J. (O.S.) K. B. 210, as to decrees of colonial courts of equity; *Harris* v. *Saunders*, (1825) 4 B. & C. 411; 3 L. J. (O.S.) K. B. 239; 28 R. R. 310, as to a judgment of one of the superior courts in Ireland; *Arnott* v. *Redfern*, (1826) 3 Bing. 353; 4 L. J. (O.S.) C. P. 89, as to a judgment of a Court of Admiralty in Scotland.

(*u*) *Russell* v. *Smyth*, (1842) 9 M. & W. 810; 11 L. J. Ex. 308; 60 R. R. 904.

(*v*) *Id.* 9 M. & W. 818, per Ld. Abinger.

(*x*) *Henderson* v. *Henderson*, *supra*; *Houlditch* v. *M. of Donegal*, (1834) 8 Bligh, N. S. 301; 37 R. R. 181.

(*y*) *Buchanan* v. *Rucker*, (1808) 1 Camp. 63; 9 R. R. 531.

(*z*) This, however, is rather a vexed question; as to the conflicting views on which, see *post*, § 1744.

not then advanced (*a*). With regard to procedure on such a judgment, it should be noted that as a foreign judgment is only *prima facie* evidence of a debt, persons who hold property as trustees for the debtor cannot be joined as defendants in such an action (*b*).

§ 1742 Whilst, however, the doctrine has met with ready acceptance on all sides that foreign judgments are *prima facie* evidence in support of the plaintiff's claim and are to be deemed right until the contrary is established (*c*), there has been much difference of opinion whether such judgments are to be deemed *conclusive*, or whether the defendant, by going at large into the *original merits*, can dispute the propriety of the decision. It may now, however, be taken to be settled that a valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for error either of fact or of law (*d*). The next following paragraph as it appeared in the last edition is retained on account of its historical interest.

§ 1744 On the one hand it has been held that foreign judgments are so far conclusive that the defendant is not at liberty to raise any defence to them which could have been raised (though it in fact was not) in the foreign court. This view has been taken several times by the Court of Queen's Bench (*e*), once by the Court of Common Pleas (*f*), and once by the Court of Exchequer (*g*), and has been also advanced by Lord Nottingham (*h*), Lord Kenyon (*i*), Lord Ellenborough (*k*), Sir L. Shadwell (*l*), Lord Wensleydale (*m*), and the Court of Exchequer in Ireland (*n*). On the other hand, Lord Hardwicke (*o*), Lord Mans-

(*a*) *Henderson* v. *Henderson*, *supra*; *Sadler* v. *Robins*, (1807) 1 Camp. 255.

(*b*) *Hawksford* v. *Giffard*, (1886) 12 App. Cas. 122; 52 L. J. P. C. 10.

(*c*) *Sinclair* v. *Fraser*, (1771) cited in 20 How. St. Tr. 468, 469; and in 1 Doug. 4 n; recognised in *Arnott* v. *Redfern*, (1826) 3 Bing. 353; 4 L. J. (O. S.) C. P. 89; and in *Robertson* v. *Struth*, (1844) 5 Q. B. 942; 64 R. R. 684; *Cowan* v. *Braidwood*, (1826) 1 Man. & G. 882; 10 L. J. C. P. 42; 56 R. R. 561.

(*d*) Dicey, Confl. of Laws (2nd ed.), p. 407, citing *Henderson* v. *Henderson*, *supra*; *De Gosse Brissac* v. *Rathbone*, (1861) 6 H. & N. 301; 30 L. J. Ex. 238; *Castrique* v. *Imrie*, (1870) L. R. 4 H. L. 414; 39 L. J. C. P. 350; *Goddard* v. *Gray*, (1870) L. R. 6 Q. B. 139; 40 L. J. Q. B. 62; and *Scott* v. *Pilkington*, (1862) 2 B. & S. 11; to which authorities may be added *Pemberton* v. *Hughes*, [1899] 1 Ch. 780; 68 L. J. Ch. 281; *Bater* v. *Bater*, [1906] P. 209; 75 L. J. P. 60; *Robinson* v. *Fenner*, [1913] 3 K. B. 835; 83 L. J. K. B. 81.

(*e*) *Henderson* v. *Henderson*, (1844) 6 Q. B. 288; *Ferguson* v. *Mahon*, (1839) 11 A. & E. 179, 183; *Bank of Australasia* v. *Nias*, (1851) 16 Q. B. 717; *Scott* v. *Pilkington*, (1862) 2 B. & S. 11.

(*f*) *Vanquelin* v. *Bouard*, (1863) 15 C. B. (N.S.) 341.

(*g*) *De Cosse Brissac* v. *Rathbone*, (1861) 6 H. & N. 301.

(*h*) *Gold* v. *Canham*, (1678) cited in note to *Kennedy* v. *Cassillis*, (1818) 2 Swanst. 325.

(*i*) *Galbraith* v. *Neville*, (1789) 1 Doug. 6, n.

(*k*) *Tarleton* v. *Tarleton*, (1815) 4 M. & S. 22.

(*l*) *Martin* v. *Nicolls*, (1830) 3 Sim. 458.

(*m*) Citing *Martin* v. *Nicolls*, in *Becquet* v. *MacCarthy*, (1831) 2 B. & Ad. 954.

(*n*) *Sims* v. *Thomas*, (1841) 3 Ir. L. R. 415.

(*o*) *Isquierdo* v. *Forbes*, (1750) cited by Ld. Mansfield, in 1 Doug. 6.

field (*p*), Chief Baron Eyre (*q*), Mr. Justice Buller (*r*), Mr. Justice Bayley (*s*), and especially Lord Brougham (*t*), have strenuously contended that foreign judgments, when actions are brought upon them, are not conclusive, but are merely *prima facie* evidence on behalf of the plaintiff. The other opinion appears to be that a judgment of a foreign court of competent jurisdiction is so far conclusive upon the merits that it will be acted upon by the courts of this country unless it is shown by the record of the proceedings on which the original judgment was founded, that it was unjustly or fraudulently obtained without actual personal notice to the party affected by it, or unless it is clearly and unequivocally shown by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law (*u*).

§ 1745. When a foreign judgment,—instead of being itself the consideration of the promise declared on,—merely comes incidentally or collaterally in question, it cannot be disputed. Thus, in *Tarleton* v. *Tarleton* (*v*), the plaintiff and defendant had been partners, and the latter, on the dissolution of the partnership, had covenanted to indemnify the former against the debts of the late firm. In an action on that covenant, the plaintiff, in order to prove the damnification, put in a judgment recovered in a foreign court by a creditor of the firm against himself and the defendant, in consequence of which his property had been seized; and the court held, that the defendant was not at liberty to show that the proceedings were erroneous.

§ 1746. Another clear rule connected with this subject is, that a foreign judgment does not occasion a *merger* of the original cause of action; and, therefore, when it becomes necessary to enforce the plaintiff's demand in this country, he may either resort to such original

(*p*) *Walker* v. *Witter*, (1778) 1 Doug. 1.

(*q*) *Philips* v. *Hunter*, (1795) 2 H. Bl. 410.

(*r*) *Galbraith* v. *Neville*, (1789) 1 Doug. 6 n.; *Messin* v. *Ld. Massareene*, (1791) 4 T. R. 493.

(*s*) *Tarleton* v. *Tarleton*, (1815) 4 M. & S. 23.

(*t*) *Houlditch* v. *Mayor of Donegal*, (1834) 8 Bligh, N. S. 301, 337—342,; *Don* v. *Lippmann*, (1837) 5 Cl. & F. 1, 20—22.

(*u*) Wheaton (4th Eng. ed.), p. 231; see also Westlake (3rd ed.), § 328; 2 Smith, L. C. (12th ed.), p. 813, *et seq*; Story Conflict of Laws, §§ 607, 608. See, also, some remarks by Lord Campbell, C.J., in *Bank of Australasia* v. *Nias*, (1851). This opinion appears to be in conformity with the view taken by the most eminent public jurists that a final judgment in a personal action in the courts of competent jurisdiction of one State ought to have conclusive effect of a *res judicata* in every other State wherever it is pleaded in bar of another action for the same cause. Wheaton, 231, citing Vattel, liv., ii., ch. vii., §§ 84, 85; Marten's Droit des Gens, §§ 93, 94, 95; Klüber Droit des Gens, § 59, Deutsche Bundes Recht, § 366.

(*v*) (1815) 4 M. & S. 20; recognised by Ld. Brougham in *Houlditch* v. *Mayor of Donegal*, (1834) 8 Bligh, N. S. 241.

cause, or bring an action upon the judgment (*x*). In the event of his adopting the former of these courses, it seems that the defendant may still, notwithstanding the production of the judgment, dispute the plaintiff's demand; for it may well be contended, that, by this mode of declaring, the plaintiff has himself courted a reinvestigation of the merits (*y*).

§ 1747. Certain statutory enactments, by which the receipt in evidence of the adjudications and proceedings of particular tribunals is regulated, must now be referred to. And first, as to the adjudications and other proceedings in *Courts of Bankruptcy*. It has been shown that some of these may be proved through the medium of the Gazette in which they have been published (*z*), and that all are capable of proof by producing either the original documents, or copies of them, provided such originals or copies be either sealed with the seal of a bankruptcy court, or signed by a judge in bankruptcy, or, in the case of copies, be certified as true by any registrar of the Court (*a*). But the question still remains, what is their *effect* when proved? And here it becomes necessary to weigh with some care the language of the Legislature, as applicable to each particular document. Thus section 132 of the Bankruptcy Act, 1914 (*b*),—after enacting, in sub-sect. 1, that "a copy of the London Gazette containing any notice inserted therein in pursuance of this Act (*c*) shall be evidence of the facts stated in the notice,"—goes on to provide, in sub-sec. 2, that "the production of a copy of the London Gazette, containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be *conclusive* evidence in all legal proceedings of the order having been duly made, and of its date."

§ 1748. Again, under section 16, sub-section 14, of the Act, "a certificate of the official receiver that a composition, or scheme has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity." So, the certificate granted by the Board of Trade declaring any person to be a trustee in bankruptcy, is made by section 143, "conclusive evidence of his appointment"; and section 19, sub-section 4, provides, that the appointment "shall take effect as from the date of the certificate." In other words, an order of

(*x*) *Hall* v. *Odber*, (1809) 11 East, 118, 126, 127; *Smith* v. *Nicolls*, (1839) 5 Bing. N. C. 221, 222; *Bank of Australasia* v. *Harding*, (1850) 9 C. B. 661; *Kelsall* v. *Marshall*, (1856) 1 C. B. (N.S.) 241.

(*y*) See 2 Smith, L.C., 12th ed., p. 814.

(*z*) *Ante*, § 1549.

(*a*) *Ante*, § 1548.

(*b*) 4 & 5 G. 5. c. 59.

(*c*) Section, 11, as to receiving order; section 18, sub-section 2, as to order of adjudication; section 29, sub-section 3, as to order annulling adjudication. See, also, Bankruptcy Rules, Form 200. All these notices must be gazetted by the Board of Trade, R. 354.

adjudication is regarded in its proper light, that is, as a judgment *in rem* (*d*)

§ 1749. The order of the Board of Trade releasing the trustee of a bankruptcy, operates so as to "discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee; but any such order may be revoked on proof that it was obtained by fraud, or by suppression or concealment of any material fact" (*e*).

§ 1750 The order of discharge of a bankrupt (*f*), which the Court of Bankruptcy is, under certain circumstances, empowered to grant, operates as a discharge of the bankrupt from all debts provable in bankruptcy, save as otherwise provided by the Act (*g*), and, moreover, it will be "conclusive evidence of the bankruptcy, and of the validity of the proceedings thereon" (*h*). When an order of discharge has been granted, the Court, if it thinks fit, may award to the bankrupt "a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part"; and this certificate will remove the disqualifications to which he would otherwise be subjected under section 32 of the Bankruptcy Act, 1883 (*i*).

§ 1751. Section 144 of the Bankruptcy Act, 1914, deserves notice in this place; for, after enacting in sub-section 1, that "all documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board. or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates, without further proof unless the contrary is shewn";—it goes on to provide in sub-section 2, that "a certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified."

§ 1752. With the view of facilitating the proof of such notices as under the Bankruptcy Act are required to be gazetted or advertised

(*d*) *Revell* v. *Blake*, (1873) L. R. 8 C. P. 533; *Ex p. Learoyd*, *In re Foulds*, (1878) 10 Ch. D. 3.

(*e*) Section 93, sub-section 3. See, also, 35 & 36 V. c. 58, s. 116.

(*f*) See Bankruptcy Rules, F. 109. See, also, as to the form and effect of a "certificate of conformity" granted to a bankrupt by the Court of Bankruptcy in Ireland, 35 & 36 V. c. 58, ss. 57 & 58, amended by 53 & 54 V. c. 71, s. 10.

(*g*) 4 & 5 G. 5, c. 59, s. 28. See *Jakeman* v. *Cook*, (1879) 4 Ex. D. 26.

(*h*) Section 28, sub-section 3.

(*i*) See 46 & 47 V. c. 52, s. 32; 53 & 54 V. c. 71, s. 9. These sections are not repealed by the consolidating Act of 4 & 5 G. 5, c. 59.

in local papers, the Registrar of each Court is empowered to file with the proceedings a memorandum (*k*) referring to and giving the date of each advertisement; and this memorandum is made "*prima facie* evidence that the advertisement to which it refers was duly inserted in the issue of the Gazette or paper mentioned in it."

§ 1753. Passing now to other judicial documents, little need be said respecting their admissibility and effect. It has already been stated, that, under the old system of pleading, *answers* in Chancery, and such *pleas* in Chancery as have been put in upon oath, are receivable against the party by whom they were sworn, as cogent admissions of the allegations which they contain (*l*); but that *demurrers* in equity are not so receivable, since *they* were merely hypothetical statements which, assuming the facts to be as alleged, denied that the defendant was bound to answer (*m*). *Bills* in Chancery, whether they were bills for relief or for discovery, are alike inadmissible, excepting to prove their own existence, or the institution of a suit, or that certain facts were in issue between the parties; their exclusion for other purposes resting upon the ground that they contained nothing more than mere suggestions of counsel, made for the purpose of obtaining an answer upon oath (*n*). It seems to follow by a parity of reasoning, that under the old system, pleadings at common law are also inadmissible as evidence of the truth of the facts stated therein (*o*); unless, indeed, they were such pleadings as required to be verified by affidavit (*p*).

§ 1754 (*q*). *Depositions*, though informally taken, are receivable, like any other admissions, against the deponent whenever he is a party (*r*); or they may be used to contradict and impeach him, when he is afterwards examined as a witness (*s*). But before they will be available as secondary evidence, and as a substitute for *vivâ voce* testimony, they must be proved to have been regularly taken, under legal proceedings duly pending, or on some other occasion sanctioned by law (*t*); and, unless the case be provided for by statute, or by a rule of court, it must further appear that the witness himself cannot be personally produced (*u*). In some cases the depositions of deceased

(*k*) See Bankruptcy Rules, r. 17, sub-s. (1), (2), (3), (4).
(*l*) *Ante*, § 727.
(*m*) *Ante*, § 828.
(*n*) *Boileau* v. *Rutlin*, (1848) 2 Ex. 665; *Doe* v. *Sybourn*, (1796) 7 T. R. 3; *Taylor* v. *Cole*, (1799) *id.* n.; *ante*, § 859.
(*o*) *Boileau* v. *Rutlin*, (1848) 2 Ex. 680, 681, per Parke, B.
(*p*) See 15 & 16 V. c. 76, ss. 80, 81, now repealed.
(*q*) Gr. Ev. §§ 552, 555, in part.
(*r*) *Ante*, § 727.
(*s*) *Ante*, §§ 1426, 1446, *et seq.*
(*t*) *Ante*, § 464, *et seq.*
(*u*) *Ante*, § 472, *et seq.*

witnesses will be admissible even against strangers: as, for instance, if they relate to a pedigree or to a question of custom or other matter of public interest, where reputation would be evidence; for, as the unsworn declarations of persons deceased would be here received, their declarations on oath are *à fortiori* admissible.

§ 1756. When an application has been refused at chambers, its effect as a bar to any fresh summons will vary according to circumstances. If the words, "no order" be indorsed upon the summons, the judge will, in general, be held to have pronounced no decision upon the merits, and the party who has failed, will consequently be allowed to make a second application; but if the indorsement be "application dismissed," this will be regarded as a judgment, which the applicant must get rescinded (*v*).

§ 1757. Where a person had applied to a Metropolitan Police magistrate under the Act of 2 & 3 V. c. 71, s. 40, for an order to deliver up certain goods of less value than £15, and such order, upon inquiry, had been refused, the court held that the applicant was not estopped by these proceedings from bringing an action of trover with respect to the same property (*x*). So, a refusal by justices in petty sessions to make an order for maintenance of a bastard, cannot be given in evidence as a bar to a second application on the part of the mother, though the original summons has been heard on the merits; but the justices at the second hearing may take into consideration the fact of the former dismissal, as a material element in guiding their judgment (*y*). Again, if an order in bastardy be drawn up in such a form as to be void in law, it cannot be a bar to a second summons in the same matter between the same parties, even though it has never been formally set aside on appeal (*z*). Neither, as it seems (*a*), will an order of quarter sessions, quashing an order of affiliation as being "bad in form," be regarded as a decision on the merits, so as to preclude the woman from applying to the petty sessions for a fresh order (*b*). But when, on appeal to quarter sessions, an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence (*c*), such order of quarter sessions is final, and no further proceedings can be taken before justices (*d*).

(*v*) *R.* v. *Machen*, (1849) 14 Q. B. 78, per Erle, J.; *R.* v. *Herrington*, (1864) 3 New R. 468, Q. B.

(*x*) *Dover* v. *Child*, (1876) 1 Ex. D. 172.

(*y*) *R.* v. *Machen*, (1849) 14 Q. B. 74; 18 L. J. M. C. 213; *R.* v. *Grant*, (1867) L. R. 2 Q. B. 466; 35 & 36 V. c. 65, s. 4; 8 & 9 V. c. 10.

(*z*) *R.* v. *Brisby*, (1849) 1 Den. C. C. 416.

(*a*) *Ex parte Harrison*, (1852) 16 Jur. 726; *R.* v. *Glynne*, (1871) L. R. 7 Q. B. 21, 23.

(*b*) See, also, *R.* v. *May*, (1880) 5 Q. B. D. 382

(*c*) 8 & 9 V. c. 10, s. 6.

(*d*) *R.* v. *Glynne*, (1871) L. R. 7 Q. B. 16.

§ 1758. The admissibility and effect of *awards* need not be discussed at any length. The decision of an arbitrator, who has been duly appointed, is as conclusive as the judgment of a competent tribunal upon the subject-matter referred to him (*e*). But an award, unlike a verdict or judgment, cannot be received as evidence in the nature of reputation (*f*); though it may occasionally be admissible, in conjunction with the submission to arbitration, as an act of ownership (*g*). It may also be noted that an award is not evidence of an account stated between the parties to the submission (*h*); unless, perhaps, in the single event of there being no regular agreement to refer, and, consequently, no award capable of being enforced in law. In such a case, as the arbitrator is not a judge, he might possibly be deemed the agent of the parties for the purpose of settling their accounts (*i*).

§ 1759. The law with respect to the admissibility and effect of probates, and of letters of administration with wills annexed, as being in the nature of judgments, has been much altered by legislation. Before the Court of Probate Acts of 1857 (*k*), these documents were uniformly rejected, whether tendered as primary or as secondary evidence of the contents of a will, on the trial of any cause relating to real estate (*l*). The ecclesiastical tribunals by which they were granted had no control over devises of real property; and so jealous were the temporal courts of spiritual interference, that even when a will of lands was irretrievably lost, nothing would induce them to look at the probate (*m*), though had the inquiry related to personalty, such a document would have furnished conclusive evidence (*n*), and though they readily received the testimony of a witness, who undertook to state the contents of the will having heard it once read before the testator's family on the day of his funeral (*o*). This anomaly has been remedied, if not entirely, at any rate to a great extent (*p*). The Act of 1857 (*q*) first provides by section 61 (*r*), that where a will affect-

(*e*) *Doe* v. *Rosser*, (1802) 3 East, 15; *Commings* v. *Heard*, (1869) L. R. 4 Q. B. 669. But see *Newall* v. *Elliot*, (1863) 1 H. & C. 797. See, also, *Rhodes* v. *Airdale Drain. Com.*, (1876) L. R. 9 C. P. 508.

(*f*) *Evans* v. *Rees*, (1839) 10 A. & E. 151; *R.* v. *Cotton*, (1813) 3 Camp. 444; *Wenman* v. *Mackenzie*, (1855) 5 E. & B. 447; *ante*, § 626.

(*g*) *Brew* v. *Haren*, (1877) I. R. 11 C. L. 198.

(*h*) *Bates* v. *Townley*, (1848) 2 Ex. 152.

(*i*) *Keen* v. *Batshore*, (1794) 1 Esp. 194; commented on in *Bates* v. *Townley*, (1848) 2 Ex. 152.

(*k*) 20 & 21 V. c. 77; and 20 & 21 V. c. 79.

(*l*) *Doe* v. *Calvert*, (1810) 2 Camp. 389.

(*m*) *Id.* (*n*) *Allen* v. *Dundas*, (1789) 3 T. R. 125.

(*o*) 2 Camp. 390, n., citing *Anon. Case*, (1810) *coram* Wood, B.

(*p*) The exclusion of certain kinds of copyhold and customary lands from the Land Transfer Act, 1897 (*post*, § 1761), necessitates this qualification.

(*q*) 20 & 21 V. c. 77.

(*r*) See corresponding enactment in the Irish Act, 20 & 21 V. c. 79, s. 65.

ing real estate is proved in solemn form, or is otherwise the subject of a contentious proceeding in the Probate Division, the heir, devisees, and other persons interested in the real estate shall, as a general rule, be cited to see proceedings, or to become parties (*s*). Section 62 (*t*) then enacts, that "Where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively stamped with the seal of" [the Probate Division] "shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure, (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration,) be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons, against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Section 63 (*u*) empowers the Probate Division, at its discretion, to proceed in any case without citing the heir or other persons interested in real estate; but it provides that the probate, decree, or order of the court shall not affect any such person, "unless he has been cited or made party to the proceedings, or derives title under or through a person so cited or made party."

§ 1760. Next comes a very important clause, for section 64 (*v*) enacts, that in any action "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in

(*s*) See Reg. 78 of Rules of 1862 for Ct. of Prob. in contentious business, and Form No. 4. Although the heir-at-law may not have been cited in that capacity to see probate, nevertheless if he has been cited in some other capacity and appeared, the probate will be conclusive evidence against him in a subsequent action relating to the real estate: *Beardsley* v. *Beardsley*, [1899] 1 Q. B. 746; 68 L. J. Q. B. 270.

(*t*) See corresponding enactment in the Irish Act, 20 & 21 V. c. 79, s. 66.

(*u*) See, also, 20 & 21 V. c. 79, s. 67 (Ir.).

(*v*) See, also, 20 & 21 V. c. 79, s. 68 (Ir.). There the intervals allowed for giving notice are respectively *seven* days, and *three* days, instead of *ten* days and *four* days, as in the English Act. See, further, 14 & 15 V. c. 57, s. 108 (Ir.), as to a somewhat similar practice in the Civil Bill Courts, excepting that no notice is required to be given; and *Jackson* v. *Jackson*, (1842) Ir. Cir. R. 469.

proof such devise or other testamentary disposition to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends, at the said trial or other proceeding, to give in evidence as proof of the devise or other testamentary disposition the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of " [the Probate Division]; " and in every such case such probate or letters of administration, or copy thereof respectively stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." Section 65 (*x*) enacts, that " in every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge, before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

§ 1761. In interpreting the above enactments the courts have decided several points of some importance. And first, it seems clear, that the notice required need not specify the purpose for which the evidence is wanted (*y*). Next, though the Act directs that the notice shall be given " to the opposite party," that direction will be satisfied by giving it to his solicitor or agent; and, indeed, under ordinary circumstances, this will be the more convenient course to pursue (*z*). Thirdly, in stating that the probate shall be " sufficient evidence " of the will, the Legislature is held to have meant, that it shall be *prima facie*, as contradistinguished from conclusive, evidence (*a*). Fourthly, the stamp alluded to in the Act is not required for the probate or letters of administration, but only for the copy of those documents (*b*); and lastly, notwithstanding the statute, a probate will not be evidence to prove the appointment of testamentary guardians (*c*). Now by the Land Transfer Act, 1897 (*d*), where real estate is vested in any person without a right in any other person to take by survivorship, on his death it devolves and becomes vested in his personal representatives as if it where a chattel real, and such persons hold it as trustees for

(*x*) See, also, 20 & 21 V. c. 79, s. 69 (Ir.).

(*y*) *Cope* v. *Mooney*, (1862) 14 Ir. C. L. R. 256; *Irwin* v. *Callwell*, (1860) 12 *id.* 144.

(*z*) *Barraclough* v. *Greenhough*, (1867) L. R. 2 Q. B. 612.

(*a*) *Barraclough* v. *Greenhough*, 36 L. J. Q. B. 251; 8 B. & S. 623; and L. R. 2 Q. B. 612, per Ex. Ch., overruling S. C. in court below, as reported 36 L. J. Q. B. 26; L. R. 2 Q. B. 1; and 7 B. & S. 170.

(*b*) *Rippon* v. *Priest*, (1863) 3 F. & F. 644.

(*c*) *Cope* v. *Mooney*, (1862) 14 Ir. C. L. R. 256.

(*d*) 60 & 61 V. c. 65, ss. 1, 2.

the persons by law beneficially entitled thereto, and Probate may be granted in respect of real estate only (*dd*).

§ 1762. The Act of 14 & 15 V. c. 105, contains the following remarkable clause respecting the admissibility and effect of orders made by the late Poor Law Board, or by the present Local Government Board (*e*), on questions touching the settlement, removal, and chargeability of paupers. Section 12 enacts, that, "the guardians of any two unions or parishes, or the guardians of a union and the guardians of a parish, or the guardians of a union or parish and the overseers of any parish, or the overseers of any two parishes, between whom any question affecting the settlement, removal, or chargeability of any poor person shall arise, may, if they think fit so to do, by agreement in writing executed in respect of any guardians by sealing with their common seal, and in respect of overseers by the signatures of a majority of them, submit such question to the board for their decision; and the board may, if they see fit, entertain such question, and by an order under their seal determine the same; and every such order shall be in all courts, and for all purposes, final and conclusive between the parties submitting such question, as to the question therein determined."

§ 1763. Under the Stamp Act, 1891, the Commissioners of Inland Revenue are intrusted with important powers for resolving doubts respecting the amount of stamp duty payable on particular instruments. Subject to such regulations as they may make, and to an appeal to the High Court, they are required, at the instance of any person, to decide whether any executed instrument submitted to them be chargeable with stamp duty or not, and if it be chargeable, they must fix the amount. They must then impress upon the document a particular stamp, denoting either that no duty is chargeable, or that the proper duty has been paid; and in either event, the document so stamped "shall be admissible in evidence, and available for all purposes, notwithstanding any objection relating to duty" (*f*). Although the adjudication of the commissioners under these provisions operates as a judgment *in rem*, and is conclusive on strangers as well as on parties, it must be pronounced before objection has been taken to the reception of the document in evidence; and, consequently, where a bond had been rejected at the trial as insufficiently stamped, the court held that the objection was not removed, though the commissioners afterwards, but before the question was argued in Banc, had affixed upon the document a denoting stamp (*g*).

(*dd*) Sec. 1 (3). "Real estate" for this purpose does not include copyholds or customary freeholds which require admission or any other act of the lord of the manor to perfect the title of a purchaser: sub-section (4).

(*e*) 34 & 35 V. c. 70, s. 2.

(*f*) 54 & 55 V. c. 39, ss. 12, 13.

(*g*) *Prudential Mutual Assurance Association* v. *Curzon*, (1852) 8 Ex. 97.

§ 1764. It is not easy to lay down any precise rule as to how far *judicial documents* will be evidence of the *facts recited* in them. This must, in each case, depend upon the language of the particular Act of Parliament under which the question arises (*h*).

§ 1765. It seems that the existence of a warrant of attorney cannot be proved, so as to render its production unnecessary, by putting in a rule of court setting it aside (*i*). But, on the other hand, the production of a writ of *supersedeas* has on more than one occasion been deemed sufficient evidence both of the issuing of the fiat against a bankrupt, and of the fact of such fiat having been superseded (*k*). It has also been held, that a warrant of commitment, in like manner with a conviction (*l*), is evidence to a certain extent of the facts which it recites; and therefore, in an action against a justice for false imprisonment, if the warrant put in by the plaintiff recites the information on oath on which it purports to have been founded, such recital will relieve the defendant from the necessity of formally proving the information (*m*).

§ 1766. The effect of a writ of *fieri facias* as evidence varies according to circumstances. If an execution debtor bring an action against the sheriff for seizing his goods, the defendant may justify his conduct by producing the writ without any copy of the judgment; but if the action be brought by a stranger, both the writ and the judgment must be proved (*n*). The reason for this distinction seems to be, that, in the former case, the plaintiff, having been a party to the original action, must be aware of the existence of the judgment, and

(*h*) For example, on the one hand, under section 26 of the Trustee Act, 1893 (56 & 57 V. c. 53), a "vesting order" may, under certain circumstances, be made by the High Court for the purpose of conveying or assigning lands, or of releasing or disposing of contingent rights, such vesting orders being founded on allegations as to the incapacity, absence, survivorship, death or intestacy of any trustee or mortgagee, and any vesting order made under the provisions of the Act, by section 32 of the same Act, has the same effect as if all necessary conveyances had been duly executed by all necessary parties. On the other hand, an order under section 43 of the old Irish Incumbered Estates Act (12 & 13 V. c. 77), now repealed by 38 & 39 V. c. 66, though by section 49 of the former Act, it is *per se* conclusive evidence that the Court had power to make it, that all necessary parties were present, that a proper petition was presented, and that due application was made, is no proof whatever either as to the title of parties stated in it to have been owners of the property (*Blake* v. *Jennings*, (1861) 12 Ir. C. L. R. 458), or of deeds, wills, or other documents therein stated to have been executed (*id.*).

(*i*) *Compton* v. *Chandless*, (1801) 4 Esp. 18. See, also, *Yorke* v. *Brown*, (1842) 10 M. & W. 78.

(*k*) *Gervis* v. *Grand Western Canal Co.*, (1816) 5 M. & S. 76; *Wright* v. *Colls*, (1849) 8 C. B. 150.

(*l*) *Ante*, §§ 1669, *et seq.*

(*m*) *Haylock* v. *Sparke*, (1853) 1 E. & B. 471. This case seems to overrule *Stephens* v. *Clark*, (1842) 2 M. & Rob. 435. See *ante*, § 728.

(*n*) *Doe* v. *Murless*, (1817) 6 M. & S. 114.

might have moved to set is aside, if it be open to objection (*o*). The rule being once established, it applies as well to a case where the vendee of the sheriff is a party, as where it is the sheriff himself, and where he is plaintiff as well as where he is defendant (*p*). Perhaps, however, the rule does not apply, where the purchaser from the sheriff is the execution creditor (*q*).

§ 1767. The general admissibility of *inquisitions* rests upon the ground, that they contain the result of inquiries made under competent authority, concerning matters in which the public is interested (*r*). As such, they are receivable even against strangers, though, as before observed, they are far from being conclusive evidence (*s*). Thus, a survey and report made by a surveyor in discharge of a duty imposed upon him by statute (*t*), and a survey of a manor taken in pursuance of a royal commission (*u*) are admissible documents of this nature. These documents, since the abolition of writs of right, and the passing of the modern statutes of limitation, have become of much less importance than they formerly were, as sources of evidence. They are still, however, occasionally of value, especially in matters of pedigree (*v*), in questions respecting the right of church patronage, or the existence or amount of a *modus*, and in peerage claims.

§ 1768. Among the most important of them may be mentioned *Domesday-book* (*x*), a work of which every one has heard, though few persons are aware of its contents. This book, which is the most ancient inquisition extant, was compiled a few years after the Conquest by commissioners, styled the Justiciaries of the King, upon the oaths of the sheriffs, the lords of the manors, the presbyters of every church, the reves of every hundred, and the bailiffs and six villans of every village. It contains a general survey of all the counties of England, except the four northern, and specifies the name and local position of each place; its possessor in the time of King Edward the Confessor; its possessor at the time of the survey; how many hides in the manor; how many carrucates in demesne; how many homagers, cotarii, servi, freemen, and tenants in socage; what quantity of wood, meadow, and pasture; what mills and fish-ponds; what the gross value in King

(*o*) *Id.*

(*p*) *Id.*; *ante*, § 729.

(*q*) *Doe* v. *Smith*, (1817) 2 Stark. 199.

(*r*) 2 Ph. Ev. 95.

(*s*) *Tooker* v. *Beaufort*, (1757) 1 Burr. 146. *Ante*, § 1674.

(*t*) *Evans* v. *Merthyr Tydvil U. C.*, [1899] 1 Ch. 241; 68 L. J. Ch. 175.

(*u*) *Blandy-Jenkins* v. *Dunraven*, (1899) 62 J. P. 661; C. A., [1899] 2 Ch. 121; 68 L. J. Ch. 589.

(*v*) See *De Roos Peer.*, (1805) 2 Coop. 545.

(*x*) Now deposited in the Record Office. See *ante*, § 1485. As to the mode of proving entries contained in it, see *ante*, § 1533.

Edward's time, and at the time of the survey; and how much each freeman or sockman had at these respective periods (*y*). If we are to believe Ingulphus, the learned Abbot of Croydon, the commissioners were not always remarkable for a strict impartiality (*z*); but be this as it may, Domesday-book is not often available as practical evidence, owing to the frequent changes of name, which the hundreds and other places described in it have undergone since the eleventh century (*a*); though it is only just to our antiquaries to state, that this defect has, to a certain extent, been remedied by their learned labours.

§ 1769. The Visitation Books, deposited at the Heralds' College, —which contain the pedigrees and coats of arms of the nobility and principal gentry in England, and which were compiled during the 16th and 17th centuries by heralds, acting under commissions from the Crown (*b*),—have on many occasions been admitted in evidence as official records to establish or defeat pedigrees and peerage claims (*c*); but in some cases, the House of Lords has first required the production of the commission under which the visitation was made (*d*). It appears that copies of these visitations have been uniformly rejected (*e*); though it is difficult to see on what ground, if the originals can be regarded as public official documents (*f*).

§ 1769A. To render inquisitions, reports, surveys, and other similar documents admissible in evidence as *public documents*, it must appear that they were made for the purpose of the public making use of them and being able to refer to them, for the fact that the public are interested in the documents, and are in a position to challenge or dispute them, if inaccurate, invests them with a certain amount of authority (*g*), therefore confidential reports made to the

(*y*) Those who wish for further information on this subject are referred to Sir H. Ellis's Introd. to Domesday, in two vols.; Ingulphus, ed. Gale, pp. 79, 80; Brady, Hist. of Eng. 205—208; Miss Strickland's Lives of Queens of England, vol. i, pp. 91—93.

(*z*) Ingulpbus, ed. Gale, p. 79. His words are, "Isti penes nostrum monasterium benevoli et amantes, non ad *verum prètium* nec ad *verum spatium* monasterium librabant, misericorditer præcaventes in futurum regiis exactionibus, et aliis oneribus, piissima nobis benevolentia providentes."

(*a*) Sir A. Ellis's Introd. vol. i., p. 34.

(*b*) Hubb. Ev. of Suc. 541, 542. See *ante*, § 657.

(*c*) *Matthews* v. *Port*, (1687) Comb. 63; *Pitton* v. *Walter*, (1719) 1 Str. 162; *Leigh Peerage*, (1829) part 2, 138; *De Lisle Peerage*, (1826) Min. Ev. 12; Tracy *Peerage*, (1839) Min. Ev. 18.

(*d*) Hubb. Ev. of Suc. 546, *et seq.*, and cases there cited. See, also, *Shrewsbury Peerage*, (1857) 7 H. L. C. 9, 27, 34.

(*e*) *Matthews* v. *Port*, (1687) Comb. 63; *Ld. Thanet* v. *Forster*, (1683) T. Jones, 224; Hubb. Ev. of Suc. 548.

(*f*) See *ante*, §§ 1598, 1599. As to the admissibility of other books kept at the Heralds' College, see Hubb. Ev. of Suc. 538—566.

(*g*) See Lord Blackburn in *Sturla* v. *Freccia*, (1880) 5 App. Cas. 623; 50 L. J. Ch. 86, at pp. 643, 644, and Farwell, J., in *Mercer* v. *Denne*, [1904] 2 Ch. 534, at

Sovereign would not be admissible as public documents (*h*), neither would War Office plans, nor plans and reports made to the Board of Trade nor reports of surveyors to the Lord Warden of the Cinque Ports, nor estimates made by the King's engineer for the reparation of Walmer Castle (*i*). For similar reasons the report of a committee appointed by a public department in a foreign State, though addressed to that department and acted on by the Government, is not necessarily admissible in the Courts here, as evidence of all the facts stated therein (*k*).

§ 1770. The Down Survey, which was made during the reign of Charles II., is rendered conclusive by statute (*l*) as to the boundaries of what are called "the old and new interests," that is, of the lands apportioned between the aboriginal inhabitants of Ireland and the English and Scotch settlers; and it is also admissible in evidence as a public document on all questions between any persons respecting the matters stated in it (*m*). The Books of Distributions, too, though they are only abstracts of this famous survey, will be received in evidence, as having been compiled under public authority, and being preserved among the records of a public office (*n*). A tithe map is admissible as a public document in evidence of any matter within the scope and purview of the authority of the Commissioners who made it (*o*). But the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, is, like the English one, not regarded by the courts of law as a public document, and it is consequently inadmissible (*p*). Still, though not evidence of title, it may sometimes be admissible on other questions (*q*). Moreover, surveys and maps, even when they cannot be treated as public documents, will

p. 541; 74 L. J. Ch. 71. See also the important judgments as to what documents are admissible in evidence as *public documents*, delivered on appeal in this case, [1905] 2 Ch. 538; 74 L. J. Ch. 723.

(*h*) *Sturla* v. *Freccia*, *supra*, per Lord Blackburn.

(*i*) *Mercer* v. *Denne*, *supra*.

(*k*) *Sturla* v. *Freccia*, *supra*. This case deserves attentive perusal, as containing several able judgments respecting an interesting branch of the law.

(*l*) 14 & 15 C. 2, c. 2, Ir.; 17 & 18 C. 2, c. 2, § 5, Ir.

(*m*) *Abp. of Dublin* v. *Ld. Trimleston*, (1849) 12 Ir. Eq. R. 251; *Tisdall* v. *Parnell*, (1863) 14 Ir. C. L. R. 1.

(*n*) *Poole* v. *Griffith*, (1865) 15 Ir. C. L. R. 239, 280; confirming *Knox* v. *Ld. Mayo*, (1858) 7 Ir. Ch. R. 563; 9 *id.* 199, 201, S. C.; and *Spaight* v. *Twiss*, (1863) 14 Ir. C. L. R. 516; and overruling on this point *Archbishop of Dublin* v. *Ld. Trimleston*, *supra*. See *Archbishop of Dublin* v. *Ld. Trimleston*, as to when decrees of the Court of Claims are admissible.

(*o*) *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188.

(*p*) As to the Irish Survey, see *Swift* v. *M'Tiernan*, (1848) 11 Ir. Eq. R. 602; *Tisdall* v. *Parnell*, (1863) 14 Ir. C. L. R. 1. As to English Ordnance Survey, see *Bidder* v. *Bridges*, (1885) 54 L. T. 529, and *Beaufort* v. *Smith*, (1849) 4 Ex. 450, as to a Public Survey by order of Cromwell.

(*q*) *Caton* v. *Hamilton*, (1889) 53 J. P. 504 (dispute as to boundary).

occasionally be received in evidence, as admissions of persons in privity with those against whom they are tendered (*r*).

§ 1771. It here deserves notice that every order, made in Ireland by the Lord Lieutenant and Council under any of the statutes for defining the boundaries of Irish Counties and other divisions and denominations of land, is in itself "conclusive evidence of every fact and circumstance necessary to authorise the making thereof," and it must be taken to have been made in conformity with the provisions of the Acts (*s*). It may also be conclusively proved by any copy "purporting to be certified as a true copy" by the clerk of the Privy Council, or by a printed copy published in the Dublin Gazette (*t*). A copy, too, of any map referred to in any such order, or of any part of such map, purporting to be certified as a true copy by such clerk, is conclusive evidence of the original map or the part thereof of which it purports to be a copy (*u*).

§ 1772. Old ecclesiastical *terriers*,—which are returns of the temporal possessions of the church in every parish, made from time to time by virtue of the 87th canon (*v*), and deposited in the bishop's registry, or the registry of the archdeacon of the diocese, or occasionally, in the chest of the parish church,—are receivable in evidence, when proved to have come from the proper repository (*x*). Their admissibility appears to rest, partly, upon the official character of the statements they contain, but principally, upon the ground that they are admissions by persons, who stood in privity with the litigants (*y*). It is thought that they would not be admissible for the parson if signed by him alone or only by him and the churchwarden nominated by him. In all cases they would be admissible against him (*z*).

(*r*) *Earl* v. *Lewis*, (1801) 1 Esp. 1; *Pollard* v. *Scott*, (1790) Pea. 19; *Wakeman* v. *West*, (1836) 7 C. & P. 479; *Doe* v. *Lakin*, (1836) *id.* 481.

(*s*) 35 & 36 V. c. 48, s. 2.

(*t*) Section 3.

(*u*) Section 4.

(*v*) This canon is as follows: "We ordain that the archbishops and all bishops within their several dioceses shall procure (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, and portions of tithes lying out of their parishes (which belong to any parsonage, or vicarage, or rural prebend), be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister to be one, and be laid up in the bishop's registry, there to be for a perpetual memory thereof."

(*x*) 1 St. Ev. 238, 239; B. N. P. 248. The repository need not be the *most proper* place of deposit. See *ante*, §§ 659, *et seq.*, and *Croughton* v. *Blake*, (1843) 12 M. & W. 208.

(*y*) 2 Ph. Ev. 120.

(*z*) Phillimore, Ecc. Law (2nd ed.), 1123, referring to *Miller* v. *Foster*, (1794) 2 Anstr. 387; *Atkins* v. *Hatton*, (1794) *ib.*; Johns. 268; Wills, Theory of Evidence, 239; *Illingworth* v. *Leigh*, (1800) 4 Gwill. 1615.

Returns made by the incumbents of livings in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, will also be admissible in evidence, on the same principle as inquisitions, where the question relates to the rights of the Church (*a*).

§ 1773. Copies of Court Rolls, and especially presentments of manor courts, are,—as already pointed out (*b*),—admissible in evidence, to prove either the customs or bounds of a manor, or any other matters of public and general interest connected with a manor, which are capable of being proved by evidence of reputation. Moreover, copies of court rolls, purporting to be surrenders of property by a person proved to be then in possession, and admittances accordingly, will, in an action by the surrenderee wherein his ownership is disputed, be good evidence of the existence of the manor, and of such property being within it (*c*). As between surrenderor and surrenderee, a presentment of an admittance upon a surrender out of court is primary evidence of the surrenderee's title, without producing the original surrender (*d*).

§ 1774 (*e*). The principles on which *official registers* are entitled to credit have already been explained (*f*); and it is here only necessary to add, that they are admissible as competent evidence of the facts they contain, provided such facts be required by law to be recorded in them for the public benefit, and be necessarily within the knowledge of the registering officer (*g*). Thus, a marriage register is evidence, not only of the fact of the marriage, but of the time of its celebration; for both these facts must have been known to the clergyman making the entry, and it was his duty to state them correctly in the register (*h*). So, a register of baptism is evidence of that fact, and of its date; but it furnishes no proof of the age of the party, further than that he was born at such date, even though it state the day of his birth (*i*). Neither, taken *per se*, is it any evidence of the place

(*a*) *Carr* v. *Mostyn*, (1850) 5 Ex. 69.

(*b*) *Ante*, §§ 612, 613, 623.

(*c*) *Standen* v. *Chrismas*, (1847) 10 Q. B. 135.

(*d*) *Doe* v. *Olley*, (1840) 12 A. & E. 481. See, also, *Doe* v. *Hall*, (1812) 16 East, 208; *Doe* v. *Mee*, (1833) 4 B. & Ad. 617; 2 L. J. K. B. 104; *R.* v. *Thurscross*, (1834) 1 A. & E. 126.

(*e*) Gr. Ev. § 493, in some part.

(*f*) *Ante*, § 1591.

(*g*) *Lyell* v. *Kennedy*, (1884) 27 Ch. D. 1; 53 L. J. Ch. 937.

(*h*) *Doe* v. *Barnes*, (1834) 1 M. & Rob. 386, 389, per Ld. Denman; 6 & 7 W. 4, c. 86, s. 38, cited *ante*, p. 1090, n.; *R.* v. *Hawes*, (1847) 1 Den. C. C. 270. As to Quaker marriages, see 35 & 36 V. c. 10.

(*i*) *Ryan* v. *Ring*, (1890) 25 L. R. Ir. 184; *Glenister* v. *Harding*, *In re Turner*, (1885) 29 Ch. D. 985; 54 L. J. Ch. 1089; *R.* v. *Clapham*, (1829) 4 C. & P. 29; *Burghart* v. *Angerstein*, (1834) 6 C. & P. 690, 696; *Wilhen* v. *Law*, (1821) 3 Stark. 63.

where the child was born, although, if other circumstances be proved, as that the child at the time of baptism was very young, or had since been removed to the parish where the register was kept, or relieved by such parish while living beyond its limits, it may then, in connection with these facts, afford presumptive evidence of the place of birth (*k*). It seems, too, that if the register contains a statement that the child was illegitimate, it may be read as some proof of that fact, being regarded as evidence of the reputation in the parish (*l*).

§ 1775. Registers of births and deaths, under the Registration Act of 1836 (*m*), as amended by the Births and Deaths Registration Act, 1874 (*n*), are not admissible in evidence at all, unless the entries purport to be signed in accordance with the prescribed rules (*o*). On proof, however, that the requirements of the Acts have been duly complied with, the entries, or certified copies of them, become evidence, not only of the births and deaths to which they relate, but of the place where these events occurred, whenever by the direction of the Registrar-General that fact had been added to the entry (*p*);

(*k*) *R.* v. *North Petherton*, (1826) 5 B. & C. 508, 510; *R.* v. *Lubbenham*, (1834) 5 B. & Ad. 968; *R.* v. *St. Katharine*, (1831) *id.* 970, n. See *R.* v. *Crediton*, (1858) 27 L. J. M. C. 265.

(*l*) *Cope* v. *Cope*, (1833) 1 M. & Rob. 271, 276.

(*m*) 6 & 7 W. 4, c. 86, s. 38, cited *ante*, § 1601.

(*n*) 37 & 38 V. c. 88, s. 38, enacts, that "an entry or certified copy of an entry of a birth or death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea.

"When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports, (a) if it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or, (b) if more than twelve months have so intervened, to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act of a death in a register under the Births and Deaths Registration Acts, 1836 to 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar-General, and in accordance with the prescribed rules."

(*o*) See *Prager* v. *Prager*, [1913] 29 Times R. 556.

(*p*) 7 W. & 1 V. c. 22, s. 8, enacts, that "it shall be lawful for the Registrar-General, if he shall think fit, to direct that the place of birth or death of any person, whose birth or death shall be registered under the said Act for registering births, deaths, and marriages, shall be added to the entry, in such manner as the Registrar-General shall direct; and such addition, when so made, shall be taken to all intents to be part of the entry in the register."

but the register books kept under the Registration of Burials Act, 1864, are simply "evidence of the burials entered therein" (*q*). Certificates of death are admissible in evidence as to the date of death (*r*), but not as to the cause of death (*s*).

§ 1775A. The Register of Patents,—which is kept at the Patent Office, and which contains "the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may be prescribed,"—is *prima facie* evidence of any matters by the Patents and Designs Act, 1907, directed or authorised to be inserted therein (*t*). The same law applies to the Register of Designs (*u*), which is kept in the same office; and with respect to the Register of Trade Marks (also kept at the same office) it is provided (*v*), that the registration of a person as proprietor of such mark shall, for the first seven years, be *prima facie* evidence, and, after that date, be conclusive evidence, of the validity of the original registration and of all subsequent assignments. It deserves notice, that the three Registers mentioned above must be deemed to include all similar registers, which have hitherto been kept under any repealed enactment (*x*).

§ 1776. Again, the daily books of a public prison are good evidence to prove the time of a prisoner's commitment or discharge (*y*), but not the cause of his commitment (*z*). So, the log-book of a convoy man-of-war, transferred from the Admiralty to the Record Office (*a*), is evidence to prove the time of sailing and the general motions of the fleet (*b*). So, the books of the Sick and Hurt Office, and the muster-books of the Navy Office, which are now under the custody of the Master of the Rolls (*c*), are admissible to prove the

(*q*) 27 & 28 V. c. 97, s. 5.

(*r*) *In re Goodrick*, [1904] P. 138; 73 L. J. P. 33; *Brierley* v. *Brierley*, [1918] P. 257; 87 L. J. P. 153; *In re Wintle*, (1870) L. R. 9 Eq. 373, *contra*, must be taken to be overruled. By parity of reasoning certificates of birth and death must also be evidence of the place of the birth or death and obviously certificates of marriage must be.

(*s*) *Bird* v. *Keep*, [1918] 2 K. B. 692; 87 L. J. K. B. 1199; [1918] W. C. & Ins. Rep. 322.

(*t*) 7 Ed. 7, c. 29, s. 28.

(*u*) 7 Ed. 7, c. 29, s. 52.

(*v*) 5 Ed. 7, c. 15, ss. 39, 40, 41.

(*x*) 7 Ed. 7, c. 29, ss. 28, 52; 5 Ed. 7, c. 15, s. 6.

(*y*) *R.* v. *Aickles*, (1784) 1 Lea. 191.

(*z*) *Salte* v. *Thomas*, (1802) 3 B. & P. 188.

(*a*) See *ante*, § 1485.

(*b*) *D'Israeli* v. *Jowett*, (1795) 1 Esp. 427; *Watson* v. *King*, (1815) 4 Camp. 275; 16 R. R. 790.

(*c*) See *ante*, § 1485.

death of a sailor, and the time when it occurred (*d*); and the latter books may also be read to show what ship the sailor belonged to, and the amount of wages due to him (*e*). So, lighthouse journals have been admitted by the Court of Admiralty as official books, for the purpose of proving the state of the wind and weather as registered therein (*f*). In all these and similar cases, the register does not prove the identity of the parties there named with the parties in question; but that fact must be established by other proof, though slight evidence will in most cases suffice (*g*).

§ 1777. Land-tax assessments are, it seems, admissible to prove the assessment of the taxes upon the individuals and for the property therein mentioned; and, perhaps, they may be taken, in connection with other facts, as some evidence of occupation or seisin (*h*). So, the valuation lists of property in the Metropolis are, for many purposes, conclusive evidence of the gross and rateable value of the hereditaments included therein, and of the fact that all requisite hereditaments have been inserted (*i*). So, the poor-law valuations in Ireland have been received on one or two occasions as some evidence of the value of the lands comprised in them (*k*); and, indeed, they furnish sufficient statutory proof of the "annual value" of such lands in all cases in which that question may be raised before the Civil Bill Court (*l*). So, under the Representation of the People Act, 1867 (*m*), it has been held, that the rate-book is some, but not conclusive, evidence of the "rateable value" of premises sufficient to qualify an occupier to be registered as a voter (*n*). So, the rate-books of an Irish poor-law union are *prima facie*, but not conclusive, evidence of the liability of a person rated therein as immediate lessor (*o*). Again, the bank-books are admissible, and indeed the best evidence,

(*d*) *Wallace* v. *Cook*, (1804) 5 Esp. 117; *R.* v. *Rhodes*, (1742) 1 Lea. 24; *Barber* v. *Holmes*, (1800) 3 Esp. 190. See Heathcote's Divorce, (1851) 1 Macq. 277, where a log-book being produced to prove that an officer of the ship was at a certain place on a given time, the House of Lords required further evidence of that fact.

(*e*) *R.* v. *Fitzgerald*, (1741) 1 Lea. 20; *R.* v. *Rhodes*, (1742) *id.* 24.

(*f*) *The Maria das Dorias*, (1863) 32 L. J. Adm. 163, per Dr. Lushington.

(*g*) *Birt* v. *Barlow*, (1779) 1 Doug. 170; *Bain* v. *Mason*, (1824) 1 C. & P. 202, 203, n.; *Barber* v. *Holmes*, *supra*; *Wedgwood's Case*, (1831) 8 Greenl. 75.

(*h*) *Smith* v. *Andrews*, [1891] 2 Ch. 678; *Doe* v. *Seaton*, (1834) 2 A. & E. 170, 178; 4 L. J. K. B. 13; 41 R. R. 412; *Doe* v. *Arkwright*, (1833) *id.* 182, n.; 2 L. J. K. B. 102; 38 R. R. 853; *Doe* v. *Cartwright*, (1824) Ry. & M. 62; 28 R. R. 774; *Ronkendorff* v. *Taylor*, (1830) 4 Pet. 349, 360.

(*i*) 32 & 33 V. c. 67, s. 45.

(*k*) *Swift* v. *M'Tiernan*, (1848) 11 Ir. Eq. R. 602; *Welland* v. *Ld. Middleton*, (1844) *id.* 603. See 23 & 24 V. c. 4, s. 9; *ante*, § 1063.

(*l*) 40 & 41 V. c. 56, ss. 31, 32.

(*m*) 30 & 31 V. c. 102, s. 6, sub-s. 2. This section has been repealed.

(*n*) *Cooke* v. *Butler*, (1872) 2 Hop. & Colt. 22; 42 L. J. C. P. 25.

(*o*) *Castlebar Guardians* v. *Ld. Lucan*, (1849) 13 Ir. L. R. 44.

to prove the transfer of stock (*p*). The books, too, kept formerly by the Metropolitan Board of Works and now by the London County Council for consolidated stock (*q*), and the registers kept in pursuance of the Colonial Stock Act, 1877 (*r*), are respectively evidence of all matters therein severally entered, and of the title of the owners of any such stock. So, some of the official documents relating to parliamentary or municipal elections are, under specified restrictions, rendered, by the Ballot Act, 1872, admissible in evidence of certain particulars (*s*). An entry in a vestry-book, stating the election of a treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of the election, and of its regularity (*t*). So, in an action for disturbing the plaintiff in the enjoyment of a pew, claimed in right of his messuage, an old entry in the vestry-book, signed by the churchwardens, stating that the pew had been repaired by a former owner of the messuage, under whom the plaintiff claimed, in consideration of his using it, was held to be evidence in support of the plaintiff's right, as having been made by the churchwardens within the scope of their official authority (*u*). But old entries in a vestry-book, made by a churchwarden apparently not in the discharge of any public duty, and by which he has not charged himself, have been rejected (*v*).

§ 1778. Besides the instances given above, the Legislature has on many occasions interposed, and expressly made official registers evidence (*x*).

(*p*) *Breton* v. *Cope*, (1791) Pea. 30; *Marsh* v. *Colnett*, (1798) 2 Esp. 665; 5 R. R. 763.

(*q*) 32 & 33 V. c. 102, s. 13; 51 & 52 V. c. 41, s. 40.

(*r*) 40 & 41 V. c. 59, s. 17.

(*s*) 35 & 36 V. c. 33, Sch. 1, Part 1, rr. 38—43, and Part 2, r. 64. See *R.* v. *Beardsall*, (1876) 1 Q. B. D. 452; 45 L. J. M. C. 157.

(*t*) *R.* v. *Martin*, (1809) 2 Camp. 100; 11 R. R. 674 (the election was under a local Act of Parliament); *Hartley* v. *Cook*, (1832) 5 C. & P. 441; 2 L. J. C. P. 141.

(*u*) *Price* v. *Littlewood*, (1812) 3 Camp. 288. This case has been questioned by Ld. Blackburn in *Sturla* v. *Freccia*, (1880) 5 App. Cas. 646; 50 L. J. Ch. 97.

(*v*) *Cooke* v. *Banks*, (1826) 2 C. & P. 478.

(*x*) For instance, the Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69), s. 33, makes registers of members *prima facie* evidence of any matters by that Act directed or authorised to be inserted therein: that is, among other particulars, of the names, addresses, and occupations of the members—of the shares or amount of stock held by each member, distinguishing each share by its number—or the amount paid, or agreed to be considered as paid, on the shares of each member, of the date at which the name of any person was entered in the register as a member, and of the date at which any person ceased to be a member (section 25). The Country Bankers Act, 1826 (7 G. 4, c. 46, ss. 4, 6), makes certified copies of the memorials filed at the office of Inland Revenue by banking co-partnerships receivable in evidence, as proof of the appointment and authority of the public officers named therein as members of such corporation or co-partnership, and that persons named therein were members thereof at the date of such account or return; though if these memorials have not been filed within the time limited by the Act, they cannot be received in evidence (*Prescott* v. *Buffery*, (1845) 1 C. B. 41), and when they are admissible they by no means preclude parties from having recourse to other proof of the facts contained in them (*Edwards*

§ 1781. The admissibility of the *books of corporations* depends, at common law, on the nature of the acts recorded. If these are obviously of a public character, and the entries have been made by the proper officer, they will be received in evidence either for or against the corporations (*y*); but if they relate to the private transactions of the corporate body, they will be inadmissible, except, perhaps, in actions between their own members (*z*). At common law, these books, whatever be the nature of the entries, can seldom be adduced by the corporation, in support of its own claims against a stranger (*a*); but by the statute law such books are not unfrequently rendered admissible. Thus, the minutes of all resolutions and proceedings of general meetings of the companies registered under the Companies (Consolidation) Act, 1908, and of the directors or managers of such companies, provided they purport to be signed, either by the pre-

v. *Buchanan*, (1832) 3 B. & Ad. 788; 1 L. J. K. B. 217; *R.* v. *Carter*, (1845) 1 Den. C. C. 65). Under the Diseases of Animals Act, 1894 (57 & 58 V. c. 57), s. 10 (5), "An order of the board or of a local authority declaring a place to be an infected place or area, or declaring a place or area, or a portion of an area, to be free from disease, or cancelling a declaration, shall be conclusive evidence to all intents of the existence or part existence or cessation of the disease, or of the error, or of any other matter whereon the order proceeds." The Local Loans Act, 1875 (38 & 39 V. c. 83), ss. 23, 24, renders the registers of nominal securities, which are provable by certified copies or extracts, "evidence of any matters authorised to be inserted therein." So, under the London Hackney Carriages Act, 1843 (6 & 7 V. c. 86, s. 16); see also 16 & 17 V. c. 112, s. 12; registers of licences granted in respect of metropolitan public carriages appear to be sufficient proof of all things therein contained. The Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 64, makes every register of a British ship, and every examined or certified copy of such a register and indorsements thereon, and every declaration made thereunder, as to a British ship, receivable in evidence as *prima facie* proof of all matters contained or recited therein (see *Myers* v. *Willis*, (1856) 17 C. B. 77; 25 L. J. C. P. 39; 104 R. R. 589; *The Princess Charlotte*, (1863) Brown & L. 75; 33 L. J. Adm. 188; and also *Leary* v. *Lloyd*, (1860) 3 E. & E. 178; 29 L. J. M. C. 194; 122 R. R. 655), and consequently of the fact that the ship registered is a British vessel (*R.* v. *Bjornsen*, (1865) L. & C. 545; 34 L. J. M. C. 180), and of the ownership of such vessel (*Hibbs* v. *Ross*, (1866) L. R. 1 Q. B. 534; 35 L. J. Q. B. 193), and under section 239 (6) all entries made in any official log-book, as directed by the same Act, are receivable in evidence (see sections 239, 241 of the Act; also *The Henry Coxon*, (1878) 3 P. D. 156; 47 L. J. Adm. 83. The Oyster Fishery (Ireland) Amendment Act, 1866 (29 & 30 V. c. 97, s. 12; see also the Fisheries (Ireland) Act, 1869 (32 & 33 V. c. 92), and the Mussels, Periwinkles, and Cockles (Ireland) Act, 1898 (61 & 62 V. c. 28)), s. 14, makes a licence granted for the formation of an oyster bed, certified under the hand of the clerk of the peace, with whom the original is lodged, evidence that such licence was duly granted, and that all preliminary matters were rightly performed. So in certain proceedings under the Sea Fisheries Acts, 1868 and 1883, it is enacted by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), ss. 373, 374, that the register of sea-fishing boats "shall be conclusive evidence that the persons entered therein at any date as owners of the boat were at that date owners thereof, and that the boat is a British sea-fishing boat."

(*y*) *R.* v. *Mothersell*, (1718) 1 Str. 93; *Thetford's Case*, (1707) 12 Vin. Abr. 90, pl. 16.

(*z*) *Marriage* v. *Lawrence*, (1819) 3 B. & Ald. 144; 22 R. R. 326; *Gibbon's Case*, (1734) 17 How. St. Tr. 810.

(*a*) *London* v. *Lynn*, (1789) 1 H. Bl. 214, n. *s.*; *Corporation of Waterford* v. *Price*, (1846) 9 Ir. L. R. 310; *Com.* v. *Woelper*, (1817) 3 Serg. & R. 29; *Highland Turnp. Co.* v. *McKean*, (1813) 10 Johns. 154.

siding chairman, or by the chairman of the next succeeding meeting, are *prima facie* evidence, not only of the facts therein entered, but of the meetings having been duly held and convened (*b*). So, the registers of shareholders in companies subject to the provisions of the Companies Clauses Consolidation Act, furnish *prima facie* evidence of the defendant being a shareholder, and of the number and amount of his shares, in all actions for calls brought by the company (*c*). Parliament having, in the above instances, disregarded the common-law rule, which prohibits a man from producing his own books as evidence for himself, the courts will take care, before they permit a company to avail itself of such an exceptional privilege, that the provisions of the statute conferring the privilege have been strictly complied with (*d*). Besides these examples, a great variety of semi-public books and documents might be mentioned, the admissibility and effect of which depend upon special legislative enactment; but as the most important of these have already been incidentally noticed while discussing the mode of proving public documents, it is not deemed expedient again to advert to them.

§ 1782. A *rule of law* of some practical value has of late years been established respecting the *mode of signing books*, which contain entries of the proceedings of commissioners, directors of companies, public trustees, and the like, at their general meetings. By a great variety of statutes, such books are rendered admissible as evidence of the proceedings entered in them; and, in general, even an unsigned minute of proceedings under the charters, &c., of incorporation of a society will, if produced from the proper custody, be admissible in evidence (*e*). Even in a penal action, the minute book of a vestry, which has been kept in accordance with the provisions of the Metropolis Local Management Act (*f*), is, at all events when

(*b*) 8 Ed. 7, c. 69, s. 71, cited *ante*, § 1596. The minutes of a meeting are not exclusive evidence of what takes place there. An unrecorded resolution may be proved *aliundè*: *In re Fireproof Doors, Lim.*, [1916] 2 Ch. 142; 85 L. J. Ch. 444. See section 220 of the same Act, which enacts that "where any company is being wound up, all books and papers of the company, and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded." See, also, *Fox's Case*, *Re Moseley Green Coal and Coke Co.*, (1863) 3 De G. J. & S. 465; 32 L. J. Bk. 57; 142 R. R. 126.

(*c*) 8 & 9 V. c. 16, s. 28. See *Waterford Ry.* v. *Wolsely*, (1851) 1 Ir. C. L. R. 444.

(*d*) *Bain* v. *Whitehaven and Furness Junction Ry.*, (1850) 3 H. L. C. 22; 88 R. R. 1; *Birkenhead, Lanc. and Ches. Junction Ry.* v. *Brownrigg*, (1849) 4 Ex. 426; 19 L. J. Ex. 27; 80 R. R. 642; *London and N. W. Ry.* v. *McMichael*, (1850) 5 Ex. 855; 20 L. J. Ex. 6; 82 R. R. 898; *West Cornwall Ry.* v. *Mowatt*, (1850) 15 Q. B. 521; 19 L. J. Q. B. 478. See *Inglis* v. *Great Northern Ry.*, (1852) 1 Macq. H. L. 112, 117, 118; *Waterford, Wexford, Wicklow and Dublin Ry.* v. *Pidcock*, (1853) 8 Ex. 279; 22 L. J. Ex. 146; 91 R. R. 484.

(*e*) *Lauderdale Peerage Case*, (1885) 10 App. Cas. 692.

(*f*) Contained in section 60 of 18 & 19 V. c. 120.

coupled with its attendance book, good evidence (*g*); but it not unfrequently happens that the Act contains a clause directing the chairman to subscribe his name to the minutes at each meeting. Notwithstanding this clause, the courts have held, that the fact of the signature being attached at the meeting, is not a condition precedent to the admissibility of the entry, provided it has been signed at some future time by the person who actually presided as chairman (*h*). This ruling has at least the advantage of being highly convenient; and regarded in that light, it was, in the year 1873, and again in the year 1882, almost entirely adopted by the Legislature, in the enactments respectively passed for facilitating the proof of proceedings of Municipal Corporations (*i*).

§ 1783. Section 22 of the last-mentioned Act enacts, in sub-section 5, that "a minute of proceedings at a meeting of the council, or of a committee, signed at the same or the next ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof"; and sub-section 6 further enacts, that "until the contrary is proved, every meeting of the council or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and, where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes." The Public Health Act, 1875, contains two similar clauses, and extends this facility of proof, not only to minutes of proceedings at meetings of local boards, committees, or joint boards, but to "copies of any orders made or resolutions passed" at such meetings (*k*).

§ 1784. While treating of the mode of proving certificates, reference has been made to a considerable number of those documents which are rendered by statute admissible evidence of the particular

(*g*) *Hemmings* v. *Williamson*, (1883) 10 Q. B. D. 459.

(*h*) *Southampton Dock Co.* v. *Richards*, (1840) 1 Man. & G. 448; 56 R. R. 436; *Miles* v. *Bough*, (1842) 3 Q. B. 845; 12 L. J. Q. B. 74; 61 R. R. 409; *In re Jennings*, (1851) 1 Ir. C. L. R. 236. See 33 & 34 V. c. 75, s. 30, sub-s. 4. See, also, *Inglis* v. *Great Northern Ry.*, *supra*, in which it was held, that, where a meeting of a Scotch railway company's finance committee was adjourned it was sufficient that the minutes of the adjourned meeting were signed, though section 101 of 8 & 9 V. c. 17, requires that "every entry shall be signed by the chairman of such meeting."

(*i*) 36 & 37 V. c. 33, s. 3; 45 & 46 V. c. 50, s. 22, sub-ss. 5, 6. The former of these Acts is now repealed by the latter.

(*k*) 38 & 39 V. c. 55, Sch. 1, r. 1, sub-r. 10, and r. 2, sub-r. 8. As to the minutes of meetings of creditors in bankruptcy, see *ante*, § 1552.

facts certified therein (*l*). To these no further allusion is necessary; but with respect to certificates generally (*m*), it may be observed, that, at common law, a certificate of a mere matter of fact, not coupled with any matter of law, cannot be received as evidence, even though given by a person in an official situation (*n*). If the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated. But as to matters which he was not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person, and will therefore be rejected (*o*). So, where an officer's certificate is made evidence by statute of certain facts, he cannot extend its effect to other facts, by stating those also in the certificate; but such parts of the certificate will be suppressed (*p*). Even the certificate of the Sovereign, under the sign-manual, cannot be received (*q*).

§ 1784A. However, the judge of the Probate Division has, on two occasions, apparently held, that the certificate of the ambassador in England of a foreign country, bearing the seal of the legation, was admissible to prove the law of that country (*r*). It seems, however, that in neither of these cases was the point argued.

§ 1785 (*s*). *Books and chronicles of public history* may be here mentioned, as partaking in some degree of the nature of public documents, and as being entitled, on the same principle, to a certain degree of credit. Any approved public and general history, therefore, is admissible to prove ancient facts of a public nature, and the general usages and customs of this or of any foreign country (*t*). But in

(*l*) *Ante*, §§ 1610, *et seq.*

(*m*) Gr. Ev. § 498, in part.

(*n*) *Omichund* v. *Barker*, (1774) Willes, 549, 550.

(*o*) *Sewell* v. *Corp*, (1824) 1 C. & P. 392; *Drake* v. *Marryat*, (1823) 1 B. & C. 473; 1 L. J. (O.S.) K. B. 161; 25 R. R. 464; *Roberts* v. *Eddington*, (1801) 4 Esp. 88; *Waldron* v. *Coombe*, (1810) 3 Taunt. 162; 12 R. R. 629; *R.* v. *Sewell*, (1845) 8 Q. B. 161; 15 L. J. Q. B. 49; 70 R. R. 442; *Oakes* v. *Hill*, (1833) 14 Pick. 442, 448; *Wolfe* v. *Washburn*, (1826) 6 Cowen, 261; *Jackson* v. *Miller*, (1827) *id.* 751; *U. S.* v. *Buford*, (1850) 3 Pet. 12, 29.

(*p*) *Johnson* v. *Hocker*, (1789) 1 Dall. 406, 407; *Governor* v. *Bell*, (1819) 3 Murph. 331; *Governor* v. *Jeffreys*, (1820) 1 Hawks. 207; *Stewart* v. *Alison*, (1821) 6 Serg. & R. 324, 329.

(*q*) *Omichund* v. *Barker*, *supra.*

(*r*) *In the goods of Prince Peter Oldenburg*, (1884) 9 P. D. 234; 53 L. J. P. 46; *In the goods of Klingeman*, (1862) 3 Sw. & Tr. 18; 32 L. J. P. 16.

(*s*) Gr. Ev. § 497, in part.

(*t*) See *Read* v. *Bishop of Lincoln*, [1892] A. C. 644; 62 L. J. P. C. 1; and cases there collected and discussed; B. N. P. 248, 249; case of Warren Hastings referred to by Ld. Ellenborough, in *Picton's Case*, (1804) 30 How. St. Tr. 492; Ld. Bridgewater's case, cited Skin. 15; *Morris* v. *Harmer*, (1833) 7 Pet. 554; *Ld. Brounker* v. *Atkyns*, (1682) Skin. 14; *St. Catherine's Hospital Case*, (1672) 1 Vent. 151; *Neale* v. *Fry*, (1684) cited 1 Salk. 281; S. C. nom. *Neal* v. *Jay*, cited 12 Mod. 86; S. C. nom. *Lady Ivy & Neal's Case*, cited Skin. 623. In each of the three last-named reports,

regard to matters not of a public and general nature, such as the custom of a particular town, a descent, the nature of a particular abbey, the boundaries of a county, and the like, they are not admissible (*u*). *A fortiori*, peerages, clergy lists, court guides, directories, university calendars, and other non-official publications of a similar nature, cannot be received in evidence (*v*).

it is distinctly stated that certain Chronicles were admitted in that case to prove on behalf of the plaintiff that King Philip did *not* assume the style of King of Spain before a certain time; but on turning to *Mossom* v. *Ivy*, (1684) 10 How. St. Tr. 555, which seems to be the same case, no Chronicles appear to have been offered in evidence for such a purpose. A history, indeed, was tendered by the defendant to prove when Charles the Fifth resigned, but this was rejected by Jeffreys, C.J., who, after styling the book in his characteristic manner, "a little lousy history," asked, with evident irritability, "Is a printed history, *written by I know not who*, an evidence in a court of law?" p. 625. It is impossible to reconcile these conflicting reports. See Pea. Ev. 82, 83.

(*u*) *Steyner* v. *Droitwich*, (1696) Skin. 623; *Piercy's Case*, (1682) T. Jones, 164; Lee Peer., Min. Ev. 155; *Evans* v. *Getting*, (1834) 6 C. & P. 586; 2 Ph. Ev. 123, 124; Hubb. Ev. of Suc. 699—701.

(*v*) *Marchmont Peerage*, (1838) Min. Ev. 62, 77; Hubb. Ev. of Suc. 700—703. As to "Medical Registers," see *ante*, § 1638; and as to "Law Lists," see *ante*, § 1639.

CHAPTER V.

PRIVATE WRITINGS.

§ 1816. The only class of *written Evidence* which remains to be considered is that of *Private Writings*. With respect to the *production* of documents at the trial little need here be said; for since parol evidence of the contents of writings cannot be given as primary proof, the party who relies upon a document must either produce it, or give such satisfactory reason for its non-production as will justify him in having recourse to secondary evidence (*a*). If, therefore, the paper be lost or destroyed, or if its production be physically impossible or highly inconvenient, the particular fact relied on must be proved (*b*); if it be in the custody of a stranger, he must be served with a writ of *subpœna duces tecum* (*c*); and if it be in the hands or power of the adverse party, the practice in general is to give him or his solicitor a regular notice to produce it at the trial (*d*). Not that, on proof of such notice, the adversary is compellable to furnish evidence against himself; but the notice is given,—as has been before explained (*e*),—to lay a foundation for the introduction of secondary evidence of the contents of the document, by showing that the party has done all in his power to insure its production.

§ 1817 (*f*). Where notice has been given to the opponent to produce papers in his possession or power, the regular time for calling for their production is not until the party who requires them has entered upon his case; till which time the other party may, in strictness, refuse to produce them, and no cross-examination as to their contents is then allowable (*g*). Still, it is considered rigorous to insist upon this rule, and as a close adherence to it would be productive of inconvenience, the judges are very unwilling to enforce it (*h*). The production of papers upon notice does not make them evidence in the

(*a*) *Ante*, § 428. As to the effect of producing a document to a witness under cross-examination, see *ante*, §§ 1413, 1446, 1452.

(*b*) *Ante*, §§ 428, 429, 438.

(*c*) *Ante*, § 457.

(*d*) *Ante*, §§ 440, *et seq.*

(*e*) *Ante*, § 440.

(*f*) Gr. Ev. § 563, in part.

(*g*) *Graham* v. *Dyster*, (1816) 2 Stark. 23.

(*h*) *Sideways* v. *Dyson*, (1817) 2 Stark. 49; *Calvert* v. *Flower*, (1836) 7 C. & P. 386; 48 R. R. 796.

cause, unless the party calling for them inspects them, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence (*i*), at least if they be in any way material to the issue (*k*). The reason for this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties.

§ 1818. If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness (*l*). Neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination (*m*), or to produce and prove it as part of his own case (*n*). The same rule prevails where a party determines upon keeping back a chattel, when called upon under notice to produce it (*o*).

§ 1819 (*p*). When the instrument, on its production, appears to have been altered, it is a general rule that the party offering it in evidence must explain this appearance, if he be called upon to do so by the issue raised (*q*), and if the instrument be not admitted by his opponent under notice (*r*); because as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion (*s*). If the alteration be noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored (*t*). It was formerly

(*i*) *Calvert* v. *Flower*, *supra*; *Wharam* v. *Routledge*, (1805) 5 Esp. 235; 8 R. R. 851.

(*k*) *Wilson* v. *Bowie*, (1823) 1 C. & P. 10. See *Sayer* v. *Kitchen*, (1795) 1 Esp. 210.

(*l*) *Edmonds* v. *Challis*, (1849) 7 C. B. 413, 439; 18 L. J. C. P. 164; *Jackson* v. *Allen*, (1822) 3 Stark. 74.

(*m*) *Doe* v. *Cockell*, (1834) 6 C. & P. 527.

(*n*) *Doe* v. *Hodgson*, (1840) 12 A. & E. 135; 9 L. J. Q. B. 327; 54 R. R. 553; *Collins* v. *Gashon*, (1860) 2 F. & F. 47.

(*o*) *Lewis* v. *Hartley*, (1835) 7 C. & P. 405. There notice was given to produce a dog for the purpose of identification.

(*p*) Gr. Ev. § 564, in part.

(*q*) *Parry* v. *Nicholson*, (1845) 13 M. & W. 779; 14 L. J. Ex. 119.

(*r*) *Freeman* v. *Steggall*, (1849) 14 Q. B. 202; 19 L. J. Q. B. 18; *ante*, § 724B.

(*s*) *Henman* v. *Dickinson*, (1828) 5 Bing. 183; 7 L. J. C. P. 68; 30 R. R. 565; *Clifford* v. *Parker*, (1841) 2 Man. & G. 910; 10 L. J. C. P. 227; 58 R. R. 603; *London and Brighton Ry.* v. *Fairclough*, (1841) *id.* 705; 10 L. J. C. P. 133; 58 R. R. 520; *Ld. Falmouth* v. *Roberts*, (1842) 9 M. & W. 471; 11 L. J. Ex. 180; 60 R. R. 790.

(*t*) The Merchant Shipping Act, 1894 (57 & 58 V. c. 60), enacts in section 122, that "Every erasure, interlineation, or alteration in any agreement with the crew

a presumption of law, that an interlineation, if nothing appeared to the contrary, had been made contemporaneously with the execution of the instrument (*u*); and this presumption still prevails in the case of a deed, because a deed cannot be altered after its execution without fraud or wrong, and fraud or wrong is never assumed without some proof (*v*). Wherever it is an offence to alter a document after it has been completed, the law presumes, *prima facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence (*x*). With respect, however, to a bill of exchange, or a promissory note, the law presumes nothing (*y*), but leaves the jury to decide, first, by inspecting the instrument itself, whether any alteration has been made; and then, on considering the extrinsic evidence offered, at what time, and under what circumstances, such alteration, if any, was made (*z*). These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide, not on conjecture, but on proof (*a*).

§ 1820. The rule of law applicable to this subject, is, that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity (*b*), provided it were made after its execution, and without the privity of the party to be affected by it, and perhaps, also, with the additional proviso, that the alteration was made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it (*c*). This rule,—which was originally propounded with respect to deeds (*d*), probably because in former days most written engagements were drawn in that form (*e*),

(except additions made for the purpose of shipping substitutes or persons engaged after the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in the erasure, interlineation, or alteration, by the written attestation (if in his Majesty's dominions) of some superintendent, justice, officer of customs, or other public functionary, or elsewhere of a British consular officer, or, where there is no such officer, of two respectable British merchants." This attestation is not required in the case of fishing boats, where all parties consent to the alteration, &c. See *id.*, s. 407.

(*u*) *Trowel* v. *Castle*, (1661) 1 Keb. 22. As to alteration in wills, see *ante*, § 164.

(*v*) *Doe* v. *Catomore*, (1851) 16 Q. B. 745; 20 L. J. Q. B. 364; 83 R. R. 714; *Simmonds* v. *Rudall*, (1850) 1 Sim. (N.S.) 136; 89 R. R. 44.

(*x*) *R.* v. *Gordon*, (1855) Dears. C. C. 586, 591; 25 L. J. M. C. 19. There an affidavit was produced with an interlineation on it.

(*y*) *Johnson* v. *D. of Marlborough*, (1818) 2 Stark. 278.

(*z*) *Bishop* v. *Chambre*, (1827) Moo. & M. 116; 6 L. J. (O.S.) K. B. 334; 33 R. R. 646; *Taylor* v. *Mosely*, (1833) 6 C. & P. 273; *Cariss* v. *Tattersall*, (1841) 2 M. & Gr. 890.

(*a*) *Knight* v. *Clements*, (1838) 8 A. & E. 215; 7 L. J. Q. B. 144; 47 R. R. 563; *Clifford* v. *Parker*, (1841) 2 Man. & G. 909; 10 L. J. C. P. 227; *Byrom* v. *Thompson*, (1839) 11 A. & E. 33; 9 L. J. Q. B. 26; 52 R. R. 269.

(*b*) *Suffell* v. *Bank of England*, (1882) 9 Q. B. D. 555; 51 L. J. Q. B. 401.

(*c*) *Davidson* v. *Cooper*, (1844) 13 M. & W. 343; 12 L. J. Ex. 467; 63 R. R. 756. See post, §§ 1827—1829. As to estoppel of the party by conduct, see *Rudd* v. *Bowles*, [1912] 2 Ch. 60; 81 L. J. Ch. 277.

(*d*) *Pigot's Case*, (1614) 11 Co. Rep. 27.

(*e*) *Master* v. *Miller*, (1791) 4 T. R. 330; 2 R. R. 399.

—has since been extended to negotiable securities (*f*), bought and sold notes (*g*), guarantees (*h*), and policies of assurance (*i*); and may now be said to apply equally to all written instruments, which constitute the evidence of contracts (*k*).

§ 1821 (*l*). The grounds of this doctrine are twofold. The first is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud, without running any risk of losing by the event in case of detection (*m*). The other is, to ensure the identity of the instrument, and prevent the substitution of another, without the privity of the party concerned (*n*). Besides these grounds, which are common to all altered written instruments, a third reason for the rule, chiefly as it applies to bills of exchange and promissory notes, may be found in the necessity which obtains for protecting the revenue arising from the stamp laws (*o*); but with respect to these laws, it should be observed, that it is immaterial whether the alteration were made with or without the consent of the parties to the instrument (*p*).

§ 1822. In saying that an instrument will be rendered void by any *material* alteration, indefinite language is of necessity employed, but a short reference to some of the leading cases on this subject will serve, in a great measure, to explain what constitutes materiality. Thus, any alteration in negotiable securities, as to the date (*q*), amount, or time of payment (*r*); the addition of a claim for a specific rate of interest (*s*); the insertion of words to limit or vary the consideration as originally expressed (*t*); the introduction of a place for

(*f*) *Id.*; (1793) 2 H. Bl. 141, S. C. in error.

(*g*) *Powell* v. *Divett*, (1812) 15 East, 29; 13 R. R. 358; *Mollett* v. *Wackerbarth*, (1847) 5 C. B. 181; 17 L. J. C. P. 47; 75 R. R. 711.

(*h*) *Davidson* v. *Cooper*, *supra*.

(*i*) *Forshaw* v. *Chabert*, (1821) 3 B. & B. 158; 23 R. R. 596; *Fairlie* v. *Christie*, (1817) 7 Taunt. 416; 18 R. R. 515; *Campbell* v. *Christie*, (1817) 2 Stark. 64.

(*k*) *Davidson* v. *Cooper*, *supra*.

(*l*) Gr. Ev. § 565, as to first six lines.

(*m*) *Master* v. *Miller*, *supra*.

(*n*) *Sanderson* v. *Symonds*, (1819) 1 Br. & B. 430; 21 R. R. 675.

(*o*) *Mason* v. *Bradley*, (1843) 11 M. & W. 394; 12 L. J. Ex. 425; 63 R. R. 687; *Davidson* v. *Cooper*, *supra*.

(*p*) *Bowman* v. *Nichol*, (1794) 5 T. R. 537. As to alterations in bills and notes, see the provisions of the Bills of Exchange Act, 1882, set out, *post*, § 1832.

(*q*) *Outhwaite* v. *Luntley*, (1815) 4 Camp. 179; 16 R. R. 771; *Walton* v. *Hastings*, (1815) *id.* 223; *Cardwell* v. *Martin*, (1808) 9 East, 180; *Master* v. *Miller*, *supra*; *Vance* v. *Lowther*, (1876) 45 L. J. Ex. 200; 1 Ex. D. 176.

(*r*) *Bowman* v. *Nichol*, (1794) 5 T. R. 537; *Alderson* v. *Langdale*, (1832) 3 B. & Ad. 660; 1 L. J. K. B. 273; 37 R. R. 513.

(*s*) *Warrington* v. *Early*, (1853) 2 E. & B. 763; 23 L. J. Ex. 47; 95 R. R. 789.

(*t*) *Knill* v. *Williams*, (1809) 10 East, 431; 10 R. R. 349.

payment, though the acceptance still remains a general acceptance (*u*); the substitution of one place for another (*v*); the converting a joint, into a joint and several, responsibility (*x*); the affixing an additional maker's name to a joint and several note after it has issued (*y*); or, it seems, the cutting off the signature of one of several co-promisers in a joint and several note (*z*);—will, at common law, as against any party not consenting thereto, invalidate the instrument, even in the hands of an innocent holder; and will for the most part prove equally fatal, by virtue of the stamp laws, though made by consent of all parties (*a*). So, the alteration of a Bank of England note, by erasing the number upon it and substituting another, will avoid the instrument, and preclude even a *bona fide* holder for value from maintaining an action upon it (*b*). Where a sold note was altered, without the knowledge of the purchaser, by inserting an additional term into the contract (*c*),—and where an agreement was apparently converted into a deed, by affixing seals to the signatures of the parties (*d*),—the respective instruments were held to be vitiated; and, in short, any alteration which causes an agreement or other writing to speak a language different, in legal effect, from what it originally spoke, is material.

§ 1823. On the other hand, the insertion of such words as the law would supply, or such as are altogether inoperative, or such as are necessary to correct an obvious error (*e*), will not constitute a

(*u*) *Macintosh* v. *Haydon*, (1826) Ry. & M. 362; 27 R. R. 757; *Burchfield* v. *Moore*, (1854) 3 E. & B. 683; 23 L. J. Q. B. 261; 97 R. R. 706; *Desbrowe* v. *Wetherby*, (1834) 1 M. & Rob. 438; *Taylor* v. *Moseley*, (1833) 1 M. & Rob. 439, n.; *Crotty* v. *Hodges*, (1842) 4 Man. & G. 561; 11 L. J. C. P. 289; *Cowie* v. *Halsall*, (1821) 4 B. & Ald. 197. See 45 & 46 V. c. 61, s. 19.

(*v*) *Tidmarsh* v. *Grover*, (1813) 1 M. & S. 735; 14 R. R. 563; *R.* v. *Treble*, (1810) 2 Taunt. 329.

(*x*) *Perring* v. *Hone*, (1826) 4 Bing. 28; 5 L. J. (O.S.) C. P. 33.

(*y*) *Gardner* v. *Walsh*, (1855) 5 E. & B. 83; 24 L. J. Q. B. 285; 103 R. R. 377; overruling *Catton* v. *Simpson*, (1838) 8 A. & E. 136. See *Gould* v. *Coombs*, (1845) 1 C. B. 543; 14 L. J. C. P. 175; *Ex parte Yates, In re Smith*, (1858) 27 L. J. Bkptcy. 9; 2 De G. & J. 191; 119 R. R. 84.

(*z*) *Mason* v. *Bradley*, (1843) 11 M. & W. 590; 12 L. J. Ex. 425; 63 R. R. 687. See *Nicholson* v. *Revill*, (1836) 4 A. & E. 675; 5 L. J. K. B. 129; 43 R. R. 460. The removing, however, of the seal of one of several obligors, does not, in the case of a *several* bond, render it void as to the others: *Collins* v. *Prosser*, (1823) 1 B. & C. 682; 1 L. J. (O.S.) K. B. 212; 25 R. R. 540. See, also, *Caldwell* v. *Parker*, (1869) I. R. 3 Eq. 519; though this case has been much doubted, if not overruled by *Suffell* v. *Bank of England*, (1882) 51 L. J. Q. B. 401; 9 Q. B. D. 555.

(*a*) Chit. on Bills, 181—185.

(*b*) *Suffell* v. *Bank of England*, (1882) 51 L. J. Q. B. 401; 9 Q. B. D. 555. See *Leeds & County Bank* v. *Walker*, (1883) 11 Q. B. D. 84; 52 L. J. Q. B. 590.

(*c*) *Powell* v. *Divett*, (1812) 15 East, 29; 13 R. R. 358; *Mollett* v. *Wackerbarth*, (1847) 5 C. B. 181; 17 L. J. C. P. 47; 75 R. R. 711.

(*d*) *Davidson* v. *Cooper*, (1844) 13 M. & W. 353; 13 L. J. Ex. 276.

(*e*) See *Bluck* v. *Gompertz*, (1852) 7 Ex. 862; 21 L. J. Ex. 278; 86 R. R. 860.

material alteration, even though made without consent; neither will an instrument be avoided by virtue of the stamp laws, though it be altered after execution in a material particular, provided the parties agree to make such alteration, in order to correct a mistake, and in furtherance of their original intention. Thus, where, subsequent to the execution of a policy, the insured inserted some words which gave him no power to do any one thing which he could not have done under the policy as it originally stood, the court held that the instrument was not vacated (*f*); and where the words "by demand" were added to a promissory note, which originally expressed no time for payment, this alteration, as it did not change the legal effect of the instrument, was held not to vitiate it, though the words were added by the payee without the assent of the maker (*g*); so too, where the name of a party to a conveyance was erroneously stated to be "William G.," and subsequently altered to "Edward Thomas G.," this was held to be an immaterial alteration, "William G." in the conveyance in fact being only an erroneous description of the real party whose name was subsequently inserted (*h*). Again, the insertion or alteration of a place for payment in a bill of exchange, though made after its acceptance, will not invalidate the instrument, at least as against the acceptor, provided the words be added or altered by the acceptor, or with his consent (*i*). So, filling in the date of a warrant of attorney after execution will not avoid the instrument, for the parties must clearly have intended that the date should be inserted (*k*). So, in a bond conditioned for the payment of £100, where the word "hundred" had been accidentally omitted in the second place in which the sum was mentioned, its insertion by a stranger was held to be immaterial (*l*); and where, in a note intended to be negotiable, the words "or order" had been left out by mistake, their insertion by the holder, with the consent of the maker, was held neither to vitiate the instrument nor to render a new stamp necessary (*m*).

(*f*) *Sanderson* v. *Symonds*, (1819) 1 Br. & B. 426; 4 Moore, 42, S. C.; 21 R. R. 675; *Clapham* v. *Cologan*, (1813) 3 Camp. 382, per Ld. Ellenborough.

(*g*) *Aldous* v. *Cornwell*, (1868) L. R. 3 Q. B. 573; 37 L. J. Q. B. 201; *Bp. of Crediton* v. *Bp. of Exeter*, [1905] 2 Ch. 455; 74 L. J. Ch. 697.

(*h*) *Howgate and Osborn's Contract*, [1902] 1 Ch. 451; 71 L. J. Ch. 279.

(*i*) *Walter* v. *Cubley*, (1833) 2 Cr. & M. 151; 3 L. J. Ex. 2; 39 R. R. 739; *Stevens* v. *Lloyd*, (1829) Moo. & M. 292; *Jacob* v. *Hart*, (1817) 6 M. & Sel. 142.

(*k*) *Keane* v. *Smallbone*, (1855) 17 C. B. 179; 25 L. J. C. P. 72; 104 R. R. 648.

(*l*) *Waugh* v. *Bussell*, (1814) 5 Taunt. 707; 15 R. R. 624.

(*m*) *Byrom* v. *Thompson*, (1839) 11 A. & E. 31; 9 L. J. Q. B. 26; 52 R. R. 269; *Kershaw* v. *Cox*, (1800) 3 Esp. 246; *Hamelin* v. *Bruck*, (1847) 9 Q. B. 306; 15 L. J. Q. B. 343; 72 R. R. 258; *Jacob* v. *Hart*, (1817) 6 M. & Sel. 142; 18 R. R. 335; *Brutt* v. *Picard*, (1824) Ry. & M. 37; 27 R. R. 727; *Robinson* v. *Touray*, (1813) 1 M. & Sel. 217; 13 R. R. 781; and see 16 R. R. 284, n.; *Farquhar* v. *Southey*, (1826) Moo. & M. 14; 13 R. R. 689; *Eagleton* v. *Gutteridge*, (1843) 11 M. & W. 465; 12 L. J. Ex. 359; 63 R. R. 655. For American cases connected with this subject, see *Hunt* v. *Adams*, (1810) 6 Mass. 519, 522; *Smith* v. *Crooker*, (1809) 5 Mass. 538; *Hale* v. *Russ*, (1821) 1 Greenl. 335; *Knapp* v. *Maltby*, (1835) 13 Wend. 587; *Brown* v. *Pinkham*, (1836) 18 Pick. 172.

§ 1824. It is not, however, on every occasion of a party tendering an instrument in evidence, that he is bound to explain any material alteration that appears upon its face; but only on those occasions, when he is seeking to enforce it, or claiming an interest under it (*n*). The extent and meaning of this rule may be well illustrated by the following cases. A party became tenant of a farm from year to year, and subsequently signed an agreement respecting the mode of tillage. His landlord brought an action for not cultivating the land according to the terms of the agreement, and the instrument, when produced, contained an erasure in the *habendum*, the term of years being altered from seven to fourteen. The court decided that the landlord was not bound to explain this alteration, because the tenant held the farm under a parol agreement, which incorporated only so much of the written instrument as was applicable to a yearly holding, and consequently it was quite immaterial whether seven or fourteen years were mentioned in that instrument. The simple contract which the parties had entered into was, that the tenant should farm the land according to certain written stipulations. "The rule of law," said Mr. Baron Parke, "applies where the obligation is by reason of the instrument; here the obligation is by reason of the parol contract of the parties, quite independent of the subscription of that paper, and arising from the occupation of the land upon all the terms of that instrument which are applicable to a tenancy from year to year, as to which an alteration in the term of years is wholly immaterial" (*o*).

§ 1825. So, in the case of *Hutchins* v. *Scott* (*p*), which was an action for an excessive distress, the plaintiff, in order to prove the amount of rent really due, put in the agreement for the lease of a house, No. 35, which was in fact the house occupied by him. The number originally inserted in the instrument was 38, and the jury found that this had been altered to 35 after the execution of the agreement, and without the defendant's knowledge. The court held that, as the demise was admitted on the record, the altered agreement might be given in evidence to show the terms of the holding. "I do not think," said Lord Abinger, "when the case is rightly under-

(*n*) *Harris* v. *Tenpany*, (1883) 1 Cab. & E. 65, seems to be an utter misapprehension of the law. That was an interpleader, in which the plaintiff claimed certain furniture which had been seized by an execution creditor. He relied on an agreement of hiring by which he had let to the execution debtor "several articles *mentioned in the schedule hereto*." At the time of executing this contract, no schedule was attached to it, but one was afterwards added by the plaintiff. On these facts Mr. Justice Lopes is reported to have actually held, that the agreement was not vitiated by the alteration, but that the goods seized might be identified with those named in the schedule. *Sed qu.* *Cf.* § 1836 and cases there cited.

(*o*) *Ld. Falmouth* v. *Roberts*, (1842) 9 M. & W. 471; 11 L. J. Ex. 180; 60 R. R. 790. See, also, *Pattinson* v. *Luckley*, (1875) L. R. 10 Ex. 330; 44 L. J. Ex. 180.

(*p*) (1837) 2 M. & W. 809; 6 L. J. Ex. 186; 46 R. R. 770.

stood, that the question arises, whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be, that it would be impossible for him to maintain an action upon it as on a demise; but it is quite a different question, whether it be given in evidence. It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact (*q*). No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws. Here, however, it is sufficient to decide, that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35 " (*r*).

§ 1826. So, also, a deed is not rendered inadmissible by alteration, if it be produced, " merely as proof of some right or title created by, or resulting from, its having been executed (*s*); as in the case of an ejectment to recover lands which have been conveyed by lease and release. There, what the plaintiff is seeking to enforce is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds. But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover " (*t*). In like manner, if the estate lies in grant, as a watercourse, and cannot exist without deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as all remedy upon the deed, will be utterly gone (*u*).

§ 1827. In the case of *Davidson* v. *Cooper* above cited (*v*), the old doctrine, that every material alteration of an instrument, *even*

(*q*) See, also, *Agricultural Cattle Insurance Co.* v. *Fitzgerald*, (1851) 16 Q. B. 432; 20 L. J. Q. B. 244.

(*r*) 2 M. & W. 815—817.

(*s*) See *Agricultural Cattle Insurance Co.* v. *Fitzgerald*, *supra*; *Ld. Ward* v. *Lumley*, (1860) 29 L. J. Ex. 322; 5 H. & N. 87; 120 R. R. 494.

(*t*) *Davidson* v. *Cooper*, (1843) 11 M. & W. 800; 13 L. J. Ex. 276. See, also, *Dr. Leyfield's Case*, (1610) 10 Co. Rep. 88; *Bolton* v. *Bp. of Carlisle*, (1793) 2 H. Bl. 259; *Doe* v. *Hirst*, (1821) 3 Stark. 60; 23 R. R. 756.

(*u*) *More* v. *Salter*, (1615) 3 Bulst. 79; *Lewis* v. *Payn*, (1827) 8 Cowen, 71.

(*v*) *Ante*, § 1820.

by a stranger, and *without the privity of either party*, avoids that instrument, has been recognised and adopted by the Court of Exchequer, and has been held to apply in all cases, *where the altered instrument is relied on as the foundation of a right sought to be enforced* (*x*). The supporters of this doctrine contend that it creates no real hardship, since the party whose right of action is defeated by the alteration has his remedy by an action against the spoliator (*y*); but this argument is entitled to little weight, since the spoliator may either be a child, or other irresponsible agent, or be utterly incompetent to pay any damages; and if it be further urged, as was done by the judges of the Exchequer Chamber in the same case (*z*), that the party who has the instrument in his possession is bound to take proper care of it, this at least assumes that the alteration is made while the instrument is in his custody, and consequently cannot support the broad proposition stated above. Indeed, it may perhaps be still questioned, whether the sound rule of law can be carried further than this, that any party, seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made, either before its execution, or at a time when the instrument was not in his possession, or under his control; and that, unless he can establish one or other of these facts, the instrument will be vitiated. However, since the case of *Davidson* v. *Cooper* (*a*), it appears to be clearly established in England, that no party can rely on a document which has been *altered while in his custody*, though he be in a position to prove most positively, that the alteration was the effect of pure accident or mistake, or was made without his privity or consent by some person, over whom he could exercise no control.

§ 1829. It certainly deserves notice, that, according to a decision in the Irish Court of Exchequer, an instrument is not rendered void in Ireland by any alteration in it, which an unauthorised stranger may make (*b*); neither, in America, is the doctrine recognised to the extent now established in England (*c*); but, unless some fraudulent

(*x*) *Davidson* v. *Cooper*, *supra*; *Crookewit* v. *Fletcher*, (1857) 26 L. J. Ex. 153; *Bk. of Hindos., China, & Japan* v. *Smith*, (1867) 36 L. J. C. P. 241.

(*y*) *Markham* v. *Gonaston*, (1688) Cro. El. 626; 11 M. & W. 791.

(*z*) "After *much doubt*, we think the judgment (of the Ct. of Ex.) right. The strictness of the rule on this subject, as laid down in *Pigot's Case*, can only be explained on the principle, that a party, *who has the custody of an instrument* made for his benefit, *is bound to preserve* it in its original state. It is highly important for preserving the purity of legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part." Per Ld. Denman, in pronouncing the judgment of the Ex. Ch., 13 M. & W. 352.

(*a*) (1843) 11 M. & W. 778; 13 *id.* 343.

(*b*) *Swiney* v. *Barry*, (1835) Jones, 109.

(*c*) Gr. Ev. § 566 & n. 1, in part, as to next twelve lines.

intent be brought home to the party claiming under the instrument, the unwarranted alteration of a writing by a stranger is treated as a merely accidental spoliation, which in that country does not vitiate the instrument (*d*). In the case of the *United States* v. *Spalding* (*e*), Mr. Justice Story strongly condemns the English doctrine, as repugnant to common sense and justice,—as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful act of third persons, or by the providence of Heaven,—and as a rule, which ought to have the support of unbroken authority, before a court of law should feel bound to surrender its judgment to what deserves no better name than a technical quibble. In these observations the American judge has been supported by Mr. Baron Alderson, who, in *Hutchins* v. *Scott* (*f*), remarked, "It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, or what the parties meant."

§ 1830 (*g*). It seems now to be tolerably clear that a mere *immaterial* alteration, though made by the *obligee himself*, will not avoid an instrument, provided it be done innocently, and to no injurious purpose (*h*.) But if the alteration be *fraudulently made* by the party claiming under the instrument, it does not seem important, whether it be in a material or an immaterial part; for, in either case, he has brought himself under the operation of the rule, established for the prevention of mal-practices; and having fraudulently destroyed the identity of the instrument, he must incur the peril of all the consequences (*i*).

(*d*) *Cutts* v. *U. S.*, (1812) 1 Gall. 69; *U. S.* v. *Spalding*, (1822) 2 Mason, 478; *Rees* v. *Overbaugh*, (1827) 6 Cowen, 746; *Lewis* v. *Payn*, (1827) 8 Cowen, 71; *Jackson* v. *Malin*, (1818) 15 Johns. 297; *Nicholls* v. *Johnson*, (1834) 10 Conn. 192; *Marshall* v. *Gougler*, (1823) 10 Serg. & R. 164.

(*e*) (1822) 2 Mason, 482.

(*f*) (1837) 2 M. & W. 814.

(*g*) Gr. Ev. § 568, in part.

(*h*) *Aldous* v. *Cornwell*, (1868) L. R. 3 Q. B. 573; 37 L. J. Q. B. 201; *Bp. of Crediton* v. *Bp. of Exeter*, [1905] 2 Ch. 255; 74 L. J. Ch. 697; *Sanderson* v. *Symonds*, (1819) 1 Br. & B. 426; 21 R. R. 675; *Hatch* v. *Hatch*, (1812) 9 Mass. 311; *Smith* v. *Dunham*, (1829) 8 Pick. 246. In *Farquhar* v. *Southey*, (1826) Moo. & M. 14; 31 R. R. 689, the acceptance of a bill was signed "Soutbey & Crowder"; the bill was originally addressed to "Messrs. Southey, Crowder & Co."; but the address was altered to correspond with the acceptance. Held, that this was an immaterial alteration, and that the acceptors were not discharged, per Littledale, J. See, also, *Lowe* v. *Fox*, (1887) 12 App. Cas. 206; 56 L. J. Q. B. 480 (case of immaterial alteration of an order under which a person was detained in a private asylum as a lunatic).

(*i*) *Pigot's Case*, (1614) 11 Co. Rep. 27; cited *arguendo*, in 4 T. R. 322, and 11 M. & W. 789; Shep. Touch. 68; *Sanderson* v. *Symonds*, *supra*. If an obligee procure a person, who was not present at the execution of the bond, to sign his name as an attesting witness, this is *prima facie* evidence of fraud, and avoids the bond: *Adams* v. *Frye*, (1841) 3 Metc. 103.

§ 1831. It has been seen that, in order to render the alteration fatal, it must be made *after the execution or other completion of the instrument*. These words are, in general, sufficiently explicit; but in two classes of cases embarrassing questions respecting their interpretation have arisen. The first class comprehends *composition deeds*, and other deeds, in which several parties with independent interests, joining to effect some general purpose, execute one common deed at different times. By considering such deeds as instruments of a peculiar nature, embracing separate contracts with different individuals, the strict rule of law has been, to a certain degree, eluded (*k*); and it has been held that any alterations made during the progress of such transactions still leave the deeds valid as to the parties previously executing them, provided such alterations have not affected the situation in which these parties stood (*l*).

§ 1832. With regard to negotiable securities the Bills of Exchange Act, 1882, the provisions of which, so far as they are material to this purpose, are applicable to bills of exchange, promissory notes, and bankers' cheques, contains express provisions as to the effect of alterations in such instruments. By section 63, where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorsee who would have had a right of recourse against the party whose signature is cancelled, is also discharged. A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative, but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. By section 64, where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers; provided that where a bill has been materially altered, but the alteration is not apparent and the bill is in the hand of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour. By section 97 (3) the effect of the stamp laws, however, is expressly preserved, the effect of which is to cut down considerably the effect of this proviso. In the case of negotiable securities a difficulty arises in applying the

(*k*) *Davidson* v. *Cooper*, *supra*, per Ld. Abinger. See *West* v. *Steward*, (1845) 14 M. & W. 47, cited *post*, § 1835.

(*l*) *Doe* v. *Bingham*, (1821) 4 B. & Ald. 675; 23 R. R. 438, recognised in *Hibblewhite* v. *M'Morine*, (1840) 6 M. & W. 215; 9 L. J. Ex. 217; 55 R. R. 578

general rule, that a material alteration made, without the consent of all parties, in an instrument after its execution renders such instrument void; because that time is calculated from the date of the making, accepting, drawing, or indorsing of the instrument by the party against whom it is produced; but the question is at what précise period will a bill or note be considered complete, so that any subsequent alteration, whether made with or without consent of the parties, will invalidate the instrument by reason of the stamp laws? In answer to this question, it may be broadly stated, that a negotiable security is complete, as soon as, but not until, it becomes an available instrument, or, in other words, when it is in the hands of a party who can make a valid claim upon it. Thus, on the one hand, an accommodation bill may be altered after it has been drawn, accepted, and indorsed, provided it has not been passed to a *bona fide* holder for value (*m*); and a bill for value, if unindorsed, is not deemed complete till its acceptance (*n*); nor, it seems, even then, unless it be absolutely returned to the payee (*o*). On the other hand, every material alteration, whether made before or after acceptance, or with or without consent, will invalidate a bill, whether it be drawn for accommodation or for value, if it be once issued to a person, who, as holder for valuable consideration, is entitled to sué any prior party thereon (*p*).

§ 1833. The principles above stated with respect to negotiable securities, apply equally to other instruments; and therefore where a bond, after execution, but before it had passed to the obligee, was altered, by inserting, with the consent of the parties, the name of an additional obligor, the court held that it was not vacated, and that no new stamp was required (*q*). The same point was ruled in *Jones* v. *Jones* (*r*), where a marriage settlement had been executed by the conveying party, but, before it was executed by the other parties, or had passed into the hands of the persons who were to take under it, a clause was objected to and struck out, after which the deed was re-executed. The question in these cases is, whether, taking into consideration all the circumstances, the matter was or was not *in fieri*; and that, to use Mr. Preston's language, "depends on the

(*m*) *Downes* v. *Richardson*, (1822) 5 B. & Ald. 674; 24 R. R. 522; *Tarleton* v. *Shingler*, (1849) 7 C. B. 812. See *Cardwell* v. *Martin*, (1808) 9 East, 190.

(*n*) *Kennerly* v. *Nash*, (1816) 1 Stark. 452.

(*o*) *Sherrington* v. *Jermyn*, (1828) 3 C. & P. 374.

(*p*) *Outhwaite* v. *Luntley*, (1815) 4 Camp. 179; 16 R. R. 771; *Walton* v. *Hastings*, (1815) *id.* 223. See further on this subject, Cbit. Bills, 186—189.

(*q*) *Matson* v. *Booth*, (1816) 5 M. & S. 223; see *Zouch* v. *Clay*, (1671) 1 Ventr. 185.

(*r*) (1835) 1 Cr. & M. 721; 2 L. J. Ex. 249. See, also, *Spicer* v. *Burgess*, (1834) 1 C. M. & R. 129; 3 L. J. Ex. 285; *Murray* v. *Ld. Stair*, (1823) 2 B. & C. 82; 26 R. R. 782; *Johnson* v. *Baker*, (1821) 4 B. & Ald. 440; 23 R. R. 338.

inquiry, whether the intended grantor has given sanction to the instrument, so as to make it conclusively his deed" (*s*).

§ 1834. Perhaps it may be stated, as a general rule, that the transaction will be deemed incomplete, and, consequently, that an alteration may be effected, if the deed remain in the grantor's possession, or be placed in the hands of a third party as an agent for him, provided there be nothing to show that it was intended to operate immediately, or that it was accepted as an effectual deed by the party in whose favour it was made (*t*). Where a deed is executed, having essential blanks which require and are intended to be filled up, and same are afterwards filled up in the presence of the party, the evidence may readily support a finding that complete delivery did not take place until after the final completion of the deed (*u*). If, however, the grantor has once parted with all control over the deed, it can no longer be altered, though it has not been actually delivered to the grantee (*v*). Thus, where A. executed a deed transferring certain railway shares to B., and, having received the purchase-money from B.'s brokers, delivered to them the instrument, the transaction was held to be perfected at common law, though B. had not executed the deed, and though the Railway Act directed that, on every sale of shares, the deed should be executed by both parties; and, therefore, the name of C. being afterwards substituted for B., and the deed re-executed by the seller, the court held that it could not operate as a conveyance to C. without a fresh stamp (*x*).

§ 1835. Questions of nicety have sometimes arisen respecting the validity of instruments, which have been executed in blank, and subsequently filled up; and distinctions have been recognised, first, between deeds and other instruments; and secondly, as to deeds, between the insertion of matter essential to their operation, and that

(*s*) 3 Prest. on Abstr. 64.

(*t*) See cases cited in last note but one.

(*u*) *Hudson* v. *Revett*, (1829) 5 Bing. 269; 7 L. J. (O.S.) C. P. 145; 30 R. R. 649. In former editions the following proposition is stated, based on *Hudson* v. *Revett*—"So, if the instrument be delivered as an *escrow*, which is not to take effect as a deed until a certain event has happened, it may be altered with impunity." The present Editors are unable to regard *Hudson* v. *Revett* as an authority for so general a proposition. As to delivery of a deed as an *escrow* merely, see *Bowker* v. *Burdekin*, (1848) 11 M. & W. 128, 147; 12 L. J. Ex. 329; 63 R. R. 541; *Furness* v. *Meek*, (1858) 27 L. J. Ex. 34; *Kidner* v. *Keith*, (1863) 15 C. B. (N.S.) 35; 137 R. R. 370. See, also, *Gudgen* v. *Besset*, (1856) 26 L. J. Q. B. 36; 6 E. & B. 986; 106 R. R. 899; *Watkins* v. *Nash*, (1875) L. R. 20 Eq. 262; 44 L. J. Ch. 505.

(*v*) *Doe* v. *Knight*, (1826) 5 B. & C. 671; 4 L. J. (O.S.) K. B. 161; 29 R. R. 355. See *Richards* v. *Lewis*, (1852) 11 C. B. 1046; 20 L. J. C. P. 117; 87 R. R. 866; and *Xenos* v. *Wickham*, (1866) L. R. 2 H. L. 296; 36 L. J. C. P. 313.

(*x*) *London and Brighton Ry.* v. *Fairclough*, (1841) 2 Man. & G. 674, 705; 10 L. J. C. P. 133; 58 R. R. 520. Perhaps, if the Railway Co., who produced and relied upon the altered deed, had shown that B.'s name had originally been inserted by *mistake*, no new stamp would have been requisite. See *ante*, § 1823.

which is not so essential. Thus, an acceptance written on a blank piece of stamped paper, may be afterwards converted into a bill of exchange, to the extent of such sum as the stamp will cover (*y*). As between the drawer and the acceptor, a blank acceptance must, indeed, be filled up within a reasonable time (*z*); but this doctrine does not apply to a *bona fide* indorsee for value without notice, for the law presumes, with reference to him, that the drawer was invested with a general authority from the acceptor to fill up the bill at any time (*a*). Again, it appears that blanks may be filled up in a deed after its execution, if the omission did not render it a nullity, and the matter inserted carries out the original intention of the grantor, or is introduced with his consent (*b*). Thus, where a party, being abroad, executed a power of attorney, whereby he appointed "—Ree of Ware" his attorney, and Mr. Ree, to whom the power was delivered, and who, according to the evidence, was the party intended to be authorised by it, inserted his Christian name in the blank space, it was held that the instrument was not invalidated, though possibly some objection might have been taken with respect to the stamp laws (*c*). So, where a debtor had assigned his property by deed to trustees for the benefit of his creditors, "whose names and the amount of whose debts were set out in a schedule thereunto annexed," the court held that the deed was valid, though at the time of its execution by the debtor, no schedule was annexed, but when the deed was produced in evidence one was appended, containing the signatures of the creditors, some of which had been erased, and others had no sums set against them (*d*).

§ 1836. But if an instrument, at the time of its execution, was, by reason of some material deficiency, incapable of operating as a

(*y*) 45 & 46 V. c. 61, s. 20, sub-s. 1; *Garrard* v. *Lewis*, (1882) 10 Q. B. D. 30; *Schultz* v. *Astley*, (1836) 2 Bing. N. C. 552; 5 L. J. C. P. 130; 42 R. R. 651; *Collis* v. *Emett*, (1790) 1 H. Bl. 313; *Russsell* v. *Langstaffe*, (1780) 2 Doug. 514. See *Hatch* v. *Searles*, (1854) 2 Sm. & G. 147; 23 L. J. Ch. 467; 97 R. R. 139; *Hogarth* v. *Latham*, (1878) 3 Q. B. D. 643; 47 L. J. Q. B. 339; and *London and South Western Bk.* v. *Wentworth*, (1880) 5 Ex. D. 96; 49 L. J. Ex. 657.

(*z*) 45 & 46 V. c. 61, s. 20, sub-s. 2; *Temple* v. *Pullen*, (1853) 8 Ex. 389; 22 L. J. Ex. 151; 91 R. R. 546. See *Carter* v. *White*, (1882) 20 Ch. D. 225; 51 L. J. Ch. 465; *Riley* v. *Gerrish*, (1851) 9 Cush. 104.

(*a*) 45 & 46 V. c. 61, s. 20, sub-s. 3. *Montague* v. *Perkins*, (1853) 22 L. J. C. P. 187; 94 R. R. 862. See *Hatch* v. *Searles*, *supra*. An acceptor who has accepted a bill bearing a stamp sufficient to cover an amount larger than that filled in at the time of acceptance and so drawn that a fraudulent alteration of the amount is possible, is not liable to a *bona fide* holder for value for any amount beyond the actual acceptance, although the bill has been subsequently fraudulently altered to a larger amount; *Scholfield* v. *Londesborough*, [1896] A. C. 514; 65 L. J. Q. B. 593. See *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777; 88 L. J. K. B. 55.

(*b*) *Markham* v. *Gonaston*, (1599) Cro. Eliz. 626; *Zouch* v. *Clay*, (1671) 1 Ventr. 185; 2 Keb. 872, 881; 2 Lev. 35, S. C.

(*c*) *Eagleton* v. *Gutteridge*, (1843) 11 M. & W. 465; 12 L. J. Ex. 359; 63 R. R. 655.

(*d*) *West* v. *Steward*, (1845) 14 M. & W. 47, and see *Rudd* v. *Bowles*, [1912] 2 Ch. 60; 81 L. J. Ch. 277.

deed, it cannot afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed it, unless such stranger be authorised by instrument under seal; for, if this were permitted, the principle would be violated which requires that an attorney to execute and deliver a deed for another must himself be appointed by deed (*e*). Thus, where a proprietor of railway shares executed a conveyance of three shares with the name of the purchaser in blank, it was held that nothing passed by this deed, and that an agent appointed by parol could not afterwards, in the absence of his principal, introduce the name of a vendee (*f*); and where a deed contained a covenant to deliver to the covenantee certain articles "as per schedule annexed," and the schedule was not annexed at the time of execution, the court decided that its subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed, and, consequently, that the instrument was insensible and void (*g*).

§ 1837. It should be observed that these last two cases turned partly on the fact that the deficiency was supplied in the absence of the granting and contracting party; and indeed, had not this been the case, the decisions would possibly have been different; for, on the principle adopted in *Hudson* v. *Revett* (*h*), if a blank in a material part of a deed be filled up after execution, and the party be present at the time and ratify the act, this will amount to evidence of redelivery, and the deed will be held valid. In that case the defendant executed and delivered a deed, conveying his property to trustees for the benefit of his creditors, the particulars of whose demands were stated therein; but a blank was left for one of the principal debts, the exact amount of which was subsequently ascertained and inserted in the deed, in the grantor's presence and with his assent, by the attorney who had prepared the deed and had it in his possession, he being one of the trustees. The defendant having afterwards recognised this instrument as valid in various transactions, the court, considering that it was originally executed as an escrow, and was not intended to be a perfect deed till all the blanks were filled up, held

(*e*) *Hibblewhite* v *.M'Morine*, (1840) 6 M. & W. 214, 216; 9 L. J. Ex. 217; 55 R. R. 578; per Parke, B. See *ante*, § 985.

(*f*) *Hibblewhite* v. *M'Morine*, *supra*, overruling *Texira* v. *Evans*, cited 1 Anstr. 228. See *Swan* v. *North British Australasian Co.*, (1863) 32 L. J. Ex. 273; 2 H. & C. 175; 133 R. R. 639; *Taylor* v. *Gt. Ind. Pen. Ry. Co.*, (1859) 28 L. J. Ch. 709.

(*g*) *Weeks* v. *Maillardet*, (1811) 14 East, 568, noticed by Parke, B., in 6 M. & W. 215; and in *West* v. *Steward*, (1845) 14 M. & W. 48. See *Dyer* v. *Green*, (1847) 1 Ex. 71; 16 L. J. Ex. 239; and *Daines* v. *Heath*, (1847) 3 C. B. 938; 16 L. J. C. P. 117.

(*h*) (1829) 5 Bing. 269; 7 L. J. (O.S.) C. P. 145; 30 R. R. 649; explained by Alderson, B., in *West* v. *Steward*, *supra*. See, also, *Tupper* v. *Foulkes*, (1861) 30 L. J. C. P. 214; 9 C. B. (N.S.) 797; 127 R. R. 889.

that the act of the grantor, in assenting to the filling up of the blank, amounted to a re-delivery of the deed thus completed (*i*).

§ 1838. Notwithstanding the rule of law which requires the party, tendering in evidence an altered instrument, to explain its appearance, it is now decided, at least with respect to letters and ancient documents coming from the right custody, that the mere fact of their being in a mutilated or imperfect state, will not throw upon the party producing them the burthen of proving when, by whom, or for what purpose, they were mutilated; but such documents will be received, though the mutilation be evidently not accidental, provided that a sufficient portion of the instrument remains to explain its general nature and effect, and it can be shown that it is produced in the same state in which it was actually found. The weight due to such a document may be a just matter of comment, and in many cases the jury would regard it as utterly valueless; still, no legal objection can be taken to its being presented to their notice, such as it is; and the right enjoyed by the opponent, of insisting that the whole instrument shall be read, is not infringed by its admission, since that rule merely provides that no part of the deed, in the state in which it actually is, shall be withheld from the jury without the consent of the adverse party (*k*).

§ 1839. Formerly a rule prevailed, that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them at least should be called to prove its execution (*l*); but this rule, was at length abrogated by the Legislature. The Common Law Procedure Act of 1854 first altered this, and now the Criminal Evidence Act, 1865, in a section which applies "to all courts of judicature, as well criminal as all others, and to all persons having, by law or consent of parties, authority to hear, receive, and examine evidence" enacts:— "It shall not be necessary to prove by the attesting witness any in-

(*i*) The same effect was given to clear and unequivocal acts of assent *in pais* by a feme mortgagor, after the death of her husband, as amounting to a re-delivery of a deed of mortgage, executed by her while a feme covert. *Goodright* v. *Straphan*, (1774) 1 Cowp. 201, 204; Shep. Touch. 58. "The general rule," said Johnson, J., in delivering the judgment of the court in *Duncan* v. *Hodges*, (1827) 4 M'C. 239, "is, that if a blank be signed, sealed, and delivered, and afterwards written, it is no deed; and the obvious reason is, that as there was nothing of substance contained in it, nothing could pass by it. But the rule was never intended to prescribe to the grantor the order of time in which the several parts of a deed should be written. A thing to be granted, a person to whom, and the sealing and delivery, are some of those which are necessary, and the whole is consummated by the delivery; and if the grantor should think proper to reverse this order in the manner of execution, but in the end makes it perfect before the delivery, it is a good deed." See *ante*, § 149.

(*k*) *Ld. Trimlestown* v. *Kemmis*, (1843) 9 Cl. & F. 763, 774, 775; 57 R. R. 135; *Evans* v. *Rees*, (1839) 10 A. & E. 151; 50 R. R. 366.

(*l*) *Doe* v. *Durnford*, (1813) 2 M. & S. 62; *Higgs* v. *Dixon*, (1817) 2 Stark. 180; *Currie* v. *Brown*, (1812) 3 Camp. 283.

strument, to the validity of which attestation is not requisite; and such instrument may be proved as if there had been no attesting witness thereto" (*m*). The first question, therefore, to be determined, when an attested document is tendered in evidence, is whether or not it be of such a nature as to require attestation. In a former chapter (*n*) many statutes were referred to, which render attestation necessary, in order to give validity to particular instruments; but notwithstanding such reference, it will probably be deemed convenient to enumerate, in the present connection, the principal documents, which must still be proved by calling one or more of the subscribing witnesses.

§ 1840. This list will be found to contain, first, all instruments executed under powers, where the parties creating such powers have thought proper, for better security, to require the execution to be attested (*o*); and next, wills (*p*); warrants of attorney, and cognovits (*q*); bills of sale (*r*); conveyances to charitable uses under the Mortmain Act (*s*); leases under the leasing powers Act for religious worship in Ireland, 1855 (*t*); certificates of searches and memorials, and some copies of enrolments, granted by the registrar of deeds and wills in Middlesex (*u*); appointments of trustees of property conveyed for religious or educational purposes (*v*); marriage registers (*x*); deeds of fathers appointing guardians of their children (*y*); assignments of bail bonds (*z*); protests of bills of exchange by persons not notaries (*a*); powers of attorney to transfer, or receive dividends on, colonial stock (*b*); and agreements between owners and drivers of metropolitan stage carriages (*c*).

§ 1841. Besides the documents just specified, all bills of sale of British (*d*) ships, together with agreements, alterations of agreements, releases, and indentures of apprenticeship, executed in conformity with the provisions of the Merchant Shipping Act, 1894 (*e*), must respectively be attested; but, in these particular cases, the subscribing witnesses need not be called to prove the due execution of the instruments; for the statute contains, in section 694, an express enactment, that "Where any document required by this Act to be executed in the presence of, or to be attested by, any witness or witnesses, that document may be proved by the evidence of any person who is able to

(*m*) 28 & 29 V. c. 18, s. 8.
(*n*) Part ii., Ch. xviii.
(*o*) See 2nd Rep. of Com. Law Commiss., p. 23.
(*p*) *Ante*, § 1050.
(*q*) *Ante*, § 1111.
(*r*) *Ante*, § 1110.
(*s*) *Id.*
(*t*) 18 & 19 V. c. 39, s. 10, cited *ante*, § 1110.
(*u*) *Ante*, § 1645.
(*v*) *Ante*, § 1110.
(*x*) *Id.*
(*y*) *Id.*
(*z*) *Id.*
(*a*) *Id.*
(*b*) 40 & 41 V. c. 59, s. 4, sub-s. 1, and s. 6.
(*c*) *Ante*, § 1099A.
(*d*) *Ante*, § 999.
(*e*) *Ante*, § 1098.

bear witness to the requisite facts, without calling the attesting witness or the attesting witnesses, or any of them."

§ 1842. But notwithstanding the clear language of the statute, as cited above in section § 1839, in petitions in Lunacy and in Chancery it is still the practice to require proof of documents by the attesting witness, though if he be abroad proof of his handwriting will be enough (*f*).

§ 1843. The general rule which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled (*g*) or a burnt (*h*) deed; as also to one, the execution of which is admitted by the party to it (*i*); and that, too, though such admission be deliberately made, either in open court (*k*), or in a subsequent agreement (*l*), or even in a sworn answer to interrogatories delivered to the party in the cause (*m*). A party in a cause who is called as a witness by his opponent, cannot be required to prove the execution by himself of any instrument, to the validity of which attestation is requisite, so long as the attesting witness is capable of being called (*n*). So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind (*o*); and the court will not dispense with his presence on account of illness, however severe (*p*). If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him before a commissioner or examiner (*q*), and if he be taken suddenly ill, a motion must be made to postpone the trial (*r*).

(*f*) *Re Rice*, (1886) 32 Ch. D. 35; 55 L. J. Ch. 799; *Re Reay's Estate*, (1855) 1 Jur. N. S. 222; see also *Leigh* v. *Lloyd*, (1865) 35 Beav. 455; 147 R. R. 258; *Re Mair's Estate*, (1873) 42 L. J. Ch. 882.

(*g*) *Breton* v. *Cope*, (1791) Pea. 44.

(*h*) *Gillies* v. *Smither*, (1819) 2 Stark. 528.

(*i*) *Abbot* v. *Plumbe*, (1779) 1 Doug. 216, referred to by Lawrence, J., in 7 T. R. 267, and in 2 East, 187; and confirmed by Ld. Ellenborough as an inexorable rule, in *R.* v. *Harringworth*, (1815) 4 M. & S. 353. See, also, *Mounsey* v. *Burnham*, (1841) 1 Hare, 15; 58 R. R. 11.

(*k*) *Johnson* v. *Mason*, (1794) 1 Esp. 89, per Ld. Kenyon, citing Ld. Mansfield to the same effect.

(*l*) *Doe* v. *Penfold*, (1838) 8 C. & P. 536. But see *Bringloe* v. *Goodson*, (1839) 5 Bing. N. C. 740; 8 L. J. C. P. 364; 50 R. R. 848; and *post*, § 1849.

(*m*) See *Call* v. *Dunning*, (1803) 4 East, 53. But see *Bowles* v. *Langworthy*, (1793) 5 T. R. 366. Also, *post*, § 1849.

(*n*) *Whyman* v. *Garth*, (1853) 8 Ex. 803; 22 L. J. Ex. 316; 91 R. R. 771.

(*o*) *Cronk* v. *Frith*, (1839) 9 C. & P. 197; 62 R. R. 744; *Rees* v. *Williams*, (1847) 1 De G. & Sm. 314, 320. See, *contra*, *Wood* v. *Drury*, (1699) 1 Ld. Raym. 734; and *Pedler* v. *Paige*, (1833) 1 M. & Rob. 258, where Parke, B., reluctantly yielded to the authority of Ld. Holt. See *ante*, § 477.

(*p*) *Harrison* v. *Blades*, (1813) 3 Camp. 457; see, *contrà*, *Jones* v. *Brewer*, (1811) 4 Taunt. 46, where Sir J. Mansfield observes, that "perhaps in some cases of sickness," the handwriting of the attesting witness may be proved. See *ante*, § 477.

(*q*) R. S. C. 1883, Ord. XXXVII., RR. 1, 5. (*r*) 3 Camp. 457.

§ 1844. The rule is equally applicable, whatever be the purpose for which the instrument is produced (*s*); but, though the witness must in the first instance be called, yet, as he is rather the witness of the court than of the party, great latitude will be allowed in the mode of examining him, and, if it be necessary, the judge will even permit questions in the nature of a cross-examination to be put (*t*). Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed (*u*).

§ 1845. Several exceptions have, however, been engrafted on the foregoing rule. The first of these is that when the *instrument is thirty years old*, the subscribing witnesses need not be called, as they are presumed to be dead (*v*). This doctrine applies to a memorial of a deed (*x*).

§ 1846. The *second exception* is, when the attesting witness has *signed the instrument merely in pursuance of a rule in some court*, and such court has subsequently recognised the validity of the instrument by *acting upon it*. Thus, where it was necessary for a defendant to prove that he had, as an insolvent, presented a petition for protection under the statute 5 & 6 V. c. 116, the production of the petition and the proceedings in the Court of Bankruptcy duly sealed, whereby it appeared that the court had granted an order of protection, was held to be sufficient evidence, not indeed of the *contents* of the petition, but of the *fact* of its having been presented, although an attorney, who had attested the petition by order of the Bankruptcy Court, was not called (*y*). The special and very limited nature of this last exception will be better understood by referring to the case of *Streeter* v. *Bartlett* (*z*), where the court refused to extend its operation. There, in order to prove an admission of a debt, the plaintiff tendered in evidence the certified copy of a schedule filed by the defendant in the Insolvent Debtors' Court, which contained an entry of such acknowledgment; but as this schedule, in accordance with a rule of the court where it was filed, was attested by the defen-

(*s*) *Manners* v. *Postan*, (1803) 4 Esp. 239, where the deed was used in evidence collaterally; *R.* v. *Jones*, (1777) 1 Lea. 174, where, upon an indictment against an apprentice for a fraudulent enlistment, the indenture was put in.

(*t*) *Bowman* v. *Bowman*, (1843) 2 Moo. & Rob. 501, per Creswell, J.; *ante*, § 1404, *ad fin.*

(*u*) *Ley* v. *Ballard*, (1790) 3 Esp. 173. n.; *Fitzgerald* v. *Elsee*, (1811) 2 Camp. 635; *Lemon* v. *Dean*, (1810) *id.* 636, n.; *Talbot* v. *Hodson*, (1816) 7 Taunt. 251, overruling *Phipps* v. *Parker*, (1808) 1 Camp. 412.

(*v*) *Ante*, § 87.

(*x*) *Miller* v. *Wheatley*, (1890) 28 L. R. Ir. 144.

(*y*) *Bailey* v. *Bidwell*, (1844) 13 M. & W. 73; 13 L. J. Ex. 264; 67 R. R. 517.

(*z*) (1848) 5 C. B. 562; 17 L. J. C. P. 140.

dant's attorney, who was not called; and as, moreover, no proof was given that the Insolvent Debtors' Court had acted upon it, the judges of the Common Pleas determined that the evidence could not be received.

§ 1847. A *third exception* is when the instrument is proved to be in the *possession of the adverse party, who refuses to produce it pursuant to notice*. In this case, the party who is driven to give secondary evidence of its contents need not call the attesting witness, though the plea be *non est factum*, and though the name of the witness were mentioned in the notice, and he be actually in court (*a*).

§ 1848 (*b*). A *fourth exception* is when the *adverse party producing* a deed pursuant to notice, *claims an interest under it in the cause*. In such case, the party producing the instrument is not permitted to call on the other for proof of the execution; for, by claiming an interest under it, he admits its validity (*c*). Still, this exception only applies when the party producing the deed claims under it some interest in the subject-matter of the cause (*d*); and, therefore, where, in an action brought for commission due to the plaintiff as agent in procuring for the defendant an apprentice, the deed of apprenticeship was produced under notice by the defendant, the plaintiff was held bound to call the attesting witness (*e*). So, where a defendant, to prove himself a partner with the plaintiff, called upon him to produce a contract which they, as partners, had made with a builder, for work to be done on the plaintiff's premises; and, on its production, contended that the plaintiff claimed an interest under this instrument, inasmuch as it would enable him, if necessary, to control the builder's proceedings, or to enforce a specific performance against him, Lord Denman required proof of the execution, and the court confirmed his ruling (*f*). Moreover, to render a document admissible without proof as against the party producing it, his interest under it must be *still subsisting* at the time of the trial (*g*); and, possibly, this may have been the ground of the decision in *Collins* v. *Bayntun* (*h*),

(*a*) *Cooke* v. *Tanswell*, (1818) 8 Taunt. 450; *Poole* v. *Warren*, (1838) 8 A. & E. 588. See *ante*, § 1818.

(*b*) Gr. Ev. § 571, in part, as to first five lines.

(*c*) *Pearce* v. *Hooper*, (1810) 3 Taunt. 60; *Rearden* v. *Minter*, (1843) 5 Mac. & G. 204; 12 L. J. C. P. 139; *Carr* v. *Burdiss*, (1835) 1 Cr. M. & R. 784; 4 L. J. Ex. 60; *Orr* v. *Morice*, (1821) 3 Br. & B. 139; *Bradshaw* v. *Bennett*, (1831) 1 M. & Rob. 143; *Doe* v. *Wainwright*, (1836) 5 A. & E. 520, 528; 6 L. J. K. B. 35; *Bell* v. *Chaytor*, (1843) 1 Car. & K. 162; *Doe* v. *Hemming*, (1826) 9 D. & R. 15. See *Nagle* v. *Shea*, (1875) I. R. 9 C. L. 389.

(*d*) *Doe* v. *M. of Cleveland*, (1829) 9 B. & C. 864, 869; 8 L. J. (O.S.) K. B. 74; *Curtis* v. *M'Sweeny*, (1841) Ir. Cir. R. 343.

(*e*) *Rearden* v. *Minter*, *supra*. See *Gordon* v. *Secretan*, (1807) 8 East, 548.

(*f*) *Collins* v. *Bayntun*, (1841) 1 Q. B. 117; 10 L. J. Q. B. 98.

(*g*) *Fuller* v. *Pattrick*, (1849) 18 L. J. Q. B. 236.

(*h*) 1 Q. B. 117.

just cited, as it would seem from the report that the builder had executed the work agreed upon before the contract was produced by the plaintiff. Where both parties claim the same interest under a deed produced on notice, the party calling for its production need not prove its execution (*i*); and the fact that the party producing the instrument claims an interest under it, will sufficiently appear by a statement to that effect, made by his solicitor shortly before the trial (*k*). The above exception does not extend to a case where a party, claiming an interest under a deed, gives it up to the adverse side some months (*l*), or perhaps any time (*m*), before the action; because, in such case, the party wishing to make it evidence has had the instrument in his own custody, and may therefore well be prepared to prove its execution.

§ 1849. Where an instrument requires attestation, the acknowledgment of its validity by a party to it does not in general,—as before stated (*n*),—waive the necessity of calling the attesting witness. Still, a few instances may be cited, in which a solemn admission by the adverse party *in reference to the cause* has been held in itself sufficient proof of execution; and these cases constitute the *fifth exception* to the rule. Thus, where a party agreed to admit a warrant of attorney "so as to enable his opponent to enter up judgment thereon," the court held that judgment might be entered up without an affidavit of the subscribing witness (*o*). So, in an action on covenant, if the defendant pays money into court on one of the breaches, this is such an admission of the validity of the deed, as to dispense with the production of the attesting witness, though the execution be denied in the statement of defence (*p*). In like manner, if a party or his solicitor, in order to avoid expense, agree to admit the execution of an instrument which he is called upon by notice to admit, he cannot afterwards require that the attesting witness should be examined (*q*). It seems also, from one or two cases, that, if a party solemnly recites a deed or will in an instrument under his *seal*, and, moreover, has *acquired* some *benefit* on the faith of the document recited being valid, he cannot compel his opponent, who relies on the recited document,

(*i*) *Knight* v. *Martin*, (1818) Gow, 46; 21 R. R. 787, per Dallas, C. J.

(*k*) *Roe* v. *Wilkins*, (1835) 4 A. & E. 86; 43 R. R. 315.

(*l*) *Vacher* v. *Cocks*, (1830) 1 B. & Ad. 147, 148; 8 L. J. (O.S.) K. B. 341; 35 R. R. 257.

(*m*) *Carr* v. *Burdiss*, (1835) 1 Cr. M. & R. 785; 4 L. J. Ex. 60.

(*n*) *Ante*, §§ 414, 1843.

(*o*) *Laing* v. *Kaine*, (1800) 2 Bos. & P. 85, per Ld. Eldon and Heath, J., Rooke, J., *dubitante*.

(*p*) *Randall* v. *Lynch*, (1810) 2 Camp. 357; 11 R. R. 340.

(*q*) *Freeman* v. *Steggall*, (1849) 14 Q. B. 203; 19 L. J. Q. B. 18. See *ante*, §§ 724A, 724B.

to prove its validity by calling the attesting witness (*r*). So, if the effect of a memorandum indorsed upon an original agreement be to incorporate and make the whole one new agreement, it will suffice to prove the due execution of the memorandum, and the witness who has attested the original agreement need not be sworn (*s*).

§ 1850. A *sixth* exception prevails, where a document is tendered in evidence as against a public officer, who is bound by law to have procured its due execution, and who has dealt with it as a document duly executed. For instance, where an action was brought under the old law (*t*) against a sheriff for taking insufficient sureties on a replevin bond, it was held that the execution of that instrument need not be proved by calling the attesting witness, if the plaintiff could show that the sheriff had assigned the bond (*u*).

§ 1851 (*v*). A *seventh* exception is recognised, where the party from *physical or legal obstacles is unable to adduce* the witness (*x*). Thus, if the witness be proved to be dead (*y*); or to be insane (*z*); or to be out of the jurisdiction of the court (*a*); or if he cannot be found after diligent inquiry (*b*); or if he have absented himself from the trial by collusion with the opposite party (*c*); it will be sufficient, but

(*r*) *Bringloe* v. *Goodson*, (1839) 5 Bing. N. C. 738; 8 L. J. C. P. 364; 50 R. R. 848; *Nagle* v. *Shea*, (1875) I. R. 9 C. L. 389; *Nash* v. *Turner*, (1795) 1 Esp. 217. See *Fishmongers' Co.* v. *Robertson*, (1845) 1 C. B. 67—71, and cases there cited.

(*s*) *Fishmongers' Co.* v. *Dimsdale*, (1852) 12 C. B. 557; 22 L. J. C. P. 44; 92 R. R. 782.

(*t*) Replevin bonds are now granted by the registrars of County Courts, and the jurisdiction of the sheriffs with respect to them has ceased. See 51 & 52 V. c. 43, ss. 133—137.

(*u*) *Plumer* v. *Brisco*, (1847) 11 Q. B. 46; 17 L. J. Q. B. 158; recognising *Scott* v. *Waithman*, (1822) 3 Stark. 168. See *Barnes* v. *Lucas*, (1825) Ry. & M. 264.

(*v*) Gr. Ev. § 572, in some part.

(*x*) See *ante*, §§ 472, 1843.

(*y*) *Adam* v. *Kerr*, (1798) 1 Bos. & P. 360.

(*z*) *Currie* v. *Child*, (1812) 3 Camp. 283; *Bennett* v. *Taylor*, (1804) 9 Ves. 381. See, also, 3 T. R. 712, per Buller, J.

(*a*) *Barnes* v. *Trompowsky*, (1797) 7 T. R. 265; even though not proved to be domiciled abroad, *Prince* v. *Blackburn*, (1802) 2 East, 250; notwithstanding the power to examine on interrogatories under Ord. XXXVII., RR. 1 and 5; *Glubb* v. *Edwards*, (1840) 2 M. & Rob. 300; *Wilson* v. *Collum*, (1881) 9 L. R. Ir. 150; and though the witness be in Dublin, *Doe* v. *Caperton*, (1839) 9 C. & P. 115, and *Hodnett* v. *Forman*, (1815) 1 Stark. 90. If the witness has set out to leave the kingdom, but the ship has been beaten back, he is still considered absent: *Word* v. *Wells*, (1809) 1 Taunt. 461; 10 R. R. 581. See, also, *Emery* v. *Twombly*, (1840) 5 Sbepl. 65.

(*b*) *Cunliffe* v. *Sefton*, (1802) 2 East, 183; *Crosby* v. *Percy*, (1808) 1 Taunt. 364; *Ld. Falmouth* v. *Roberts*, (1842) 9 M. & W. 469; 11 L. J. Ex. 180; 60 R. R. 790; *Parker* v. *Hoskins*, (1810) 2 Taunt. 223; *In re Hux*, (1877) 46 L. J. P. 39; *Burt* v. *Walker*, (1821) 4 B. & Ald. 697; *Spooner* v. *Payne*, (1847) 4 C. B. 328; 16 L. J. C. P. 225; see *post*, § 1855.

(*c*) *Egan* v. *Larkin*, (1842) Arm. M. & O. 403; *Ld. Clanmorris* v. *Mullen*, (1837) Craw. & D. Abr. Cas. 8; *Spooner* v. *Payne*, *supra*.

perhaps not necessary in all cases (*d*), to prove his handwriting. If the instrument be lost, and the name of the subscribing witness be unknown (*e*), the execution must be proved by other evidence.

§ 1852. It is yet an undecided point whether an *eighth exception* will not be allowed in favour of *instruments executed by corporations*, and whether such a document will not be sufficiently proved by merely showing that the seal affixed is the seal of the corporation, without calling the attesting witness (*f*).

§ 1853. A *ninth exception* has, in several old cases (*g*), been recognised in respect of *deeds*, the validity of which depends upon the fact of their being *enrolled* (*h*). No modern case has expressly decided this point, and though in practice it is still not unusual to admit such deeds on proof of enrolment, the principle of thus admitting them, except as against the party on whose acknowledgment they have been enrolled, has been questioned by Mr. Justice Buller (*i*). It is worthy of remark, that in the case of *Doe* v. *Lloyd*, which was tried twice, and turned upon the validity of a deed enrolled under the Mortmain Act, the execution of the indenture was proved on both trials (*k*).

§ 1853A. A *tenth exception* to the general rule, requiring that where attestation is necessary, the execution of a document shall be proved by one of the attesting witnesses, arises, as will be recollected (*l*), under the Merchant Shipping Act.

§ 1854. Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary to call *one* of them (*m*).

(*d*) *R.* v. *St. Giles*, (1853) 22 L. J. M. C. 54; 1 E. & B. 642; *In re Hux*, *supra*. See *post*, § 1862.

(*e*) *Keeling* v. *Ball*, (1796) Pea. Add. Cas. 88.

(*f*) *Moises* v. *Thornton*, (1799) 8 T. R. 307; *Doe* v. *Chambers*, (1836) 4 A. & E. 410; 6 N. & M. 539; 5 L. J. K. B. 123; S. C.

(*g*) Bro. Abr. Faits enroll. pl. 11, citing P. 7, E. 4, fol. 5, pl. 13, in which that point is distinctly laid down. See, also, *Lady Holcroft* v. *Smith*, (1702) 2 Freem. 259; *Thurle* v. *Madison*, (1655) Sty. 462; *Smartle* v. *Williams*, (1695) 3 Lev. 387.

(*h*) See *ante*, §§ 1119, *et seq*. See, further, as to enrolments, *ante*, §§ 1645, 1650A, *ad fin*.

(*i*) B. N. P. 255. "If divers persons seal a deed, and one of them acknowledges it, it may be enrolled, and may ever after be given in evidence as a deed enrolled; but it would be of very mischievous consequence to say therefore, that a deed, enrolled upon the acknowledgment of a hare trustee, might be given in evidence against the real owner of the land without proving it executed by him. However, that has been the general opinion, and it seems fortified in some degree by 10 A., c. 18." See *ante*, § 419.

(*k*) (1839) 5 Bing. N. C. 742, and 1 Man. & G. 683.

(*l*) *Ante*, § 1841.

(*m*) *Holdfast* v. *Dowsing*, (1746) 2 Str. 1254; B. N. P. 264; *Hindson* v. *Kersey*, (1765) 4 Burn, Ecc. L. 118, per Ld. Camden; Gresl. Ev. 120; *Forster* v. *Forster*,

§ 1855 (*n*). The *degree of diligence* required in seeking for the subscribing witnesses is the same as in the search for a lost paper (*o*), the principle being, in both cases, identical. The inquiry must be strict, diligent, and honest, and in all respects satisfactory to the court under all the circumstances. It should be made at the residence of the witness, if known, and at all other places where he may be expected to be found; as also, in general, of his relatives and others, who may be supposed capable of affording information respecting him. A reference to one or two decisions will serve to illustrate this subject. In the case of the *Earl of Falmouth* v. *Roberts* (*p*), the plaintiff relied upon an agreement, to which his steward was the attesting witness. This man, having been charged with embezzlement, had absconded, and could not be found, though inquiries were made for him at his house, and at the inns which he was in the habit of frequenting. The court held that this was sufficient search to let in evidence of his handwriting, although no application was shown to have been made to any member of his family. In another case, after proof that inquiry had been made at the residences of the parties to the instrument respecting the witness, and that no account could be obtained as to who he was, or where he lived, proof of handwriting was admitted, though it was urged that, in such a case, a public advertisement for him should have been inserted in the newspapers (*q*). Again, in *Burt* v. *Walker* (*r*), the defendant's clerk was the witness to his bond, and on being subpœnaed for the plaintiff, he said that he would not attend. He, however, did attend, though apparently without any view of exhibiting himself as a witness; and the trial being put off, it was afterwards twice postponed on account of his absence, upon affidavits that he could not be found. Six weeks after the first postponement the cause was tried, when, it appearing that search had been made for the witness at the defendant's house and in the neighbourhood, as also at Margate, to which place the defendant stated that he had gone, evidence of his handwriting was held to be admissible. In all cases of this nature, the answers to the inquiries may be given in evidence, they being not hearsay, but parts of the *res gestæ* (*s*).

(1864) 33 L. J. P. & M. 113; *Belbin* v. *Skeats*, (1858) 1 Sw. & Tr. 148. See *ante*, § 393.

(*n*) Gr. Ev. § 574, in part as to first nine lines.

(*o*) *Ante*, § 429.

(*p*) (1842) 9 M. & W. 469; 11 L. J. Ex. 180; 60 R. R. 790.

(*q*) *Cunliffe* v. *Sefton*, (1802) 2 East, 183.

(*r*) (1821) 4 B. & Ald. 697. For other instances, see *Wardell* v. *Fermor*, (1809) 2 Camp. 282; *Willman* v. *Worrall*, (1838) 8 C. & P. 380; *Wyatt* v. *Bateman*, (1836) 7 C. & P. 586; *Doe* v. *Powell*, (1836) *id.* 617; *Kay* v. *Brookman*, (1828) 3 C. & P. 555; *Morgan* v. *Morgan*, (1832) 9 Bing. 359; 2 L. J. C. P. 27; *Spooner* v. *Payne*, (1847) 4 C. B. 328; 16 L. J. C. P. 225; *Austin* v. *Rumsey*, (1849) 2 Car. & K. 736.

(*s*) *Ante*, § 475.

§ 1856 (*t*). If the instrument be necessarily attested by more than one witness, the absence of them all must be duly accounted for, in order to let in secondary evidence of the execution (*u*); but when such evidence is rendered admissible, proof of the handwriting of any one of the witnesses will, in general, be deemed sufficient, provided it be accompanied by some evidence of the identity of the party sued, with the person who appears to have executed the instrument (*v*). Proof of the signature of the obligor is an obvious, though by no means the only, mode of establishing his identity; and with the view of ascertaining the nature and amount of evidence which will be deemed sufficient for this purpose, a few cases on the subject of identity will here be noticed.

§ 1857. The attesting witness must prove the identity of the party to the instrument with that of the party to the dispute. In an action against the acceptor of a bill, which was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford," a witness proved that this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but he did not know whether that Mr. Crawford was the defendant. The court held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not that person (*x*). In *Simpson* v. *Dismore* (*y*), where an apothecary brought his action for medicines and attendance, and, in order to prove that he had been duly admitted to practise, produced a licence from the Apothecaries' Company, which was granted to a person bearing his name, the court held that no further evidence was necessary to show that he was the party named in the licence. In *Russell* v. *Smyth* (*z*), where the question was, whether the defendant was proved to be the same person as the defender in a Scotch suit, the judges decided that there was ample evidence of identity, on the ground that the names, professions, places of abode, and ages of the parties appeared to be the same. So, in *Smith* v. *Henderson* (*a*), which was an action on the case for negligence in navigation, it was objected that the evidence did not show that the defendant was the pilot in charge of the vessel;

(*t*) Gr. Ev. §§ 574, 575, in part, as to first seven lines.

(*u*) *Cunliffe* v. *Sefton*, (1802) 2 East, 183; *Wright* v. *Doe* d. *Tatham*, (1834) 1 A. & E. 21, 22; 3 L. J. Ex. 366; 40 R. R. 226; *Whitelock* v. *Musgrove*, (1833) 1 C. & M. 511.

(*v*) *Adam* v. *Kerr*, (1798) 1 Bos. & P. 360; *Nelson* v. *Whittall*, (1817) 1 B. & Ald. 19; *Doe* v. *Paul*, (1829) 3 C. & P. 613; 33 R. R. 708.

(*x*) *Greenshields* v. *Crawford*, (1842) 9 M. & W. 314; 11 L. J. Ex. 372; 60 R. R. 740. It will be seen that the distinction between this case and *Jones* v. *Jones*, (1841) 9 M. & W. 75; was, that in the latter, the name of Hugh Jones was said to be common, whereas that of Charles Banner Crawford was certainly unusual.

(*y*) (1841) 9 M. & W. 47; 11 L. J. Ex. 137; 60 R. R. 663.

(*z*) (1842) *Id.* 818, 819; 11 L. J. Ex. 308; 60 R. R. 904.

(*a*) (1842) *Id.* 798; 11 L. J. Ex. 315; 60 R. R. 893.

whereupon the plaintiff's counsel called out "Mr. Henderson," and a man in court answered "Here; I am the pilot." A witness then proved that this man, at the time of the accident, was acting as pilot. Mr. Baron Rolfe, thinking that this was not sufficient evidence of identity, directed a nonsuit, but the court above set it aside. Mr. Baron Parke, during the argument, observed, "similarity of name and residence, or similarity of name and trade, will do"; and he added in the judgment, "The defendant is sued on the face of the *declaration* as William Henderson, a pilot. A man in court answers to the name of Henderson, is a pilot, and was proved to be the pilot acting on board the vessel. He therefore fulfils the description in the declaration in two respects at least, since his name and calling resemble those of the alleged defendant" (*b*).

§ 1859. Where a witness, called to prove the defendant's handwriting, said that he had corresponded with a person bearing his name, who dated his letters from Plymouth Dock, where the defendant resided, and where it appeared that no other person of the same name lived, the evidence of identity was held to be sufficient (*c*); and in *Warren* v. *Sir J. C. Anderson, Bart.* (*d*), where the only proof of the defendant's signature to a bill was given by a clerk of Messrs. Coutts, who stated that two years before the trial he saw a person, whom he did not know, but who called himself Sir J. C. Anderson, Bart., sign his name,—that he had since seen cheques similarly signed pass through the banking house, and that he thought the handwriting was the same as that on the bill,—the court held that the evidence, weak as it confessedly was, might be submitted for the consideration of the jury.

§ 1860. It is, however, now well established that in ordinary cases, where no particular circumstance tends to raise a question as to the party being the same, mere identity of name is something from which an inference of identity may be drawn (*e*).

§ 1862. When writings are produced, and it becomes necessary to show by whom they were written or signed, the simplest mode of proof is to call the writer himself, or some person who actually saw the paper or signature written. When such evidence cannot be procured, as must often be the case, recourse may be had, either to the testimony

(*b*) 9 M. & W. 801.

(*c*) *Harrington* v. *Fry*, (1824) Ry. & M. 90; 3 L. J. (O.S.) C. P. 244.

(*d*) (1839) 8 Scott, 384; 54 R. R. 860.

(*e*) See *Sewell* v. *Evans*, (1843) 4 Q. B. 626; 12 L. J. Q. B. 277 n.; 62 R. R. 449; *Roden* v. *Ryde*, (1843) 4 Q. B. 626; 12 L. J. Q. B. 276; 62 R. R. 449; recognised in *Hamber* v. *Roberts*, (1849) 7 C. B. 861. See, also, *Murieta* v. *Wolfhagen*, (1849) 2 Car. & K. 744; and *Reynolds* v. *Staines*, (1849) 2 Car. & K. 745.

of witnesses, who are acquainted with the handwriting, or to a comparison of the document in dispute with any writing proved to the satisfaction of the judge to be genuine (*f*). These last modes of proof, indeed, may in all cases be given in the first instance, since the law recognises no distinction between them and the ocular proof just mentioned; but as they are obviously of a less satisfactory character than direct testimony, any unnecessary reliance on them is calculated to raise a suspicion, that the party is actuated by some improper motive in withholding evidence of a more conclusive nature.

§ 1863. The knowledge of a person's handwriting may have been acquired in both or either of two ways (*g*). The first is from having seen him write; and though the weight of the evidence, which depends upon knowledge so obtained, must of course vary in degree according to the number of times that the party has been seen to write, the interval that has elapsed since the last time, the circumstances, whether of hurry or deliberation, under which he wrote, and the opportunities and motives which the witness had for observing the handwriting with attention (*h*); yet the evidence will be admissible, though the witness has not seen the party write for twenty years (*i*), or has seen him write but once, and then only his surname (*k*). Indeed, on one occasion, a witness was permitted to speak to the genuineness of a person's mark, from having frequently seen it affixed by him on other documents (*l*). The proof in such cases may be very slight, but the jury will be allowed to weigh it. The witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands (*m*). Still, the party calling the witness may interrogate him, if he thinks proper, as to the circumstances on which his belief is founded; though if it should appear that the belief rests on the probabilities of the case, or on the character or conduct of the supposed writer, and not on the actual knowledge of the handwriting, the testimony will be

(*f*) See *post*, § 1869.

(*g*) See 3 Benth. Ev. 598, 599.

(*h*) *Doe* v. *Suckermore*, (1836) 5 A. & E. 730; 7 L. J. K. B. 33; 44 R. R. 533.

(*i*) *R.* v. *Horne Tooke*, (1795) 25 How. St. Tr. 71, 72; *Eagleton* v. *Kingston*, (1803) 8 Ves. 473, 474, per Ld. Eldon.

(*k*) 5 A. & E. 730, per Patteson, J.; *Garrells* v. *Alexander*, (1801) 4 Esp. 37; *Willman* v. *Worrall*, (1838) 8 C. & P. 380; *Burr* v. *Harper*, (1816) Holt, N. P. 420; *Lewis* v. *Sapio*, (1827) Moo. & M. 39. In this last case, Ld. Tenterden refused to recognise the authority of *Powell* v. *Ford*, (1817) 2 Stark. 164, where Ld. Ellenborough rejected the testimony of a witness who had seen the defendant write his surname only once, the acceptance of a bill in question having been signed at full length. See, also, *Warren* v. *Anderson*, (1839) 8 Scott, 384; 54 R. R. 850.

(*l*) *George* v. *Surrey*, (1830) Moo. & M. 516; 31 R. R. 755; per Tindal, C.J., after some hesitation.

(*m*) *Moody* v. *Rowell*, (1835) 17 Pick. 419, overruling *Slaymaker* v. *Wilson*, (1829) 1 Pennsylv. 216.

rejected (*n*). Where a witness, called to establish a forgery, had become acquainted with the signature of the party, from having seen him, after the commencement of the suit, sign his name for the purpose of showing the witness his true manner of writing it, the evidence was held inadmissible, Lord Kenyon justly observing that the party might, through design, have written differently from his common mode of signature (*o*).

§ 1864. The second way in which the knowledge of a person's handwriting may be acquired, is by the witness having seen, in the ordinary course of business, documents, which by some evidence, direct or circumstantial, are proved to have been written by such person. Thus, if the witness has received letters purporting to be in the handwriting of the party, and has either personally communicated with him respecting them, or written replies to them, producing further correspondence, or acquiescence by the party in some matter to which they relate, or has so adopted them into the ordinary business transactions between himself and the party, as to induce a reasonable presumption in favour of their genuineness, his evidence will be admissible (*p*). So, if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is, that the answer was written by the person addressed in the letter; and, consequently, the witness who received such answer, may be examined as to the genuineness of any other paper, which it is necessary to show was or was not written by the same person (*q*). Again, the clerk who has constantly read the letters, or the broker who has been consulted upon them, is as competent as the merchant to whom they were addressed, to judge whether another signature is that of the writer of the letters; and a servant who has habitually carried his master's letters to the post, has thereby had an opportunity of obtaining a knowledge of his writing, though he never saw him write, or received a letter from him (*r*).

§ 1865. In one case, an attorney was permitted to speak to the signature of an attesting witness, though his knowledge of the handwriting was solely derived from having seen the same signature

(*n*) *R.* v. *Murphy*, (1837) 8 C. & P. 306, 307; *Da Costa* v. *Pym*, (1797) Pea. Add. Cas. 144.

(*o*) *Stanger* v. *Searle*, (1793) 1 Esp. 15. See also, *Page* v. *Homans*, (1837) 2 Shepl. 478.

(*p*) *Doe* v. *Suckermore*, (1836) 5 A. & E. 731; 7 L. J. K. B. 33; 44 R. R. 533; *Ld. Ferrers* v. *Shirley*, (1730) Fitzg. 195; B. N. P. 236; *Carey* v. *Pitt*, (1797) Pea. Add. Cas. 130; *Tharpe* v. *Gisburne*, (1825) 2 C. & P. 21; *Harrington* v. *Fry*, (1824) Ry. & M. 90; 3 L. J. C. P. 244; *Burr* v. *Harper*, (1816) Holt, N. P. 420; *Com.* v. *Corey*, (1823) 2 Pick. 47; *Johnson* v. *Daverne*, (1821) 19 Johns. 134; *Pope* v. *Askew* (1840) 1 Iredell, 16.

(*q*) *Carey* v. *Pitt*, (1797) Pea. Add. Cas. 130.

(*r*) *Doe* v. *Suckermore*, *supra*.

attached to an affidavit, which had been filed by the opposite party in a previous stage of the cause (*s*). Here the opposite party, having used the affidavit as a genuine document, was in a manner estopped from disputing the fact that it was signed by the person whose signature it bore; but, perhaps, after all, some doubt may be entertained respecting the correctness of this decision; since in another case the plaintiff's attorney was not allowed to prove the defendant's handwriting, though he had frequently seen and acted upon other papers in the Master's office, which the opposite attorney admitted had been written by the defendant (*t*).

§ 1866. Where in an action on a joint and several promissory note against three persons, the signature of one of them was attempted to be proved by calling the solicitor for the defendants, whose knowledge of the handwriting in question was founded on the circumstance that he had received a retainer purporting to be signed by his three clients, and had acted upon it in defending the action, the Court held that his testimony was inadmissible, as no proof was given that the party had ever acknowledged the signature to the solicitor, and either of the other two defendants might have signed the retainer for him with his assent (*u*). So, the testimony of an inspector of franks, called to prove the handwriting of a member of Parliament, has on two occasions been rejected, where the knowledge of the witness was simply derived from his having frequently seen franks pass through the post-office, bearing the name of such member, but where he had never communicated with the member on the subject of the franks; for, in this case, the superscriptions of the letters seen by the witness might possibly have been forgeries (*v*). These last decisions certainly carry the law to the verge of impropriety, since they are founded on a presumption, which is not only improbable in the highest degree, but is in direct contradiction to the sound rule, that a crime is not to be presumed, or so much as suspected, without special cause, in any single instance; much less in a number of unconnected instances (*x*).

§ 1868. When witnesses are called to speak to handwriting they should declare their belief on the subject, though in one case it was held by Lord Kenyon, that the evidence of a witness, who, acknowledging his inability to form a belief, merely stated that the paper produced was like the handwriting of the individual by whom it purported

(*s*) *Smith* v. *Sainsbury*, (1832) 5 C. & P. 196; 38 R. R. 802; per Park, J., cited by Ld. Denman in *Doe* v. *Suckermore*, *supra*.

(*t*) *Greaves* v. *Hunter*, (1826) 2 C. & P. 477, per Abbott, C.J.

(*u*) *Drew* v. *Prior*, (1843) 5 Man. & G. 264; 12 L. J. C. P. 144.

(*v*) *Carey* v. *Pitt*, (1797) Pea. Add. Cas. 130; 4 R. R. 895; *Batchelor* v. *Honeywood*, (1799) 2 Esp. 714.

(*x*) 3 Benth. Ev. 604.

to have been written, was admissible (*y*). This case,—though recognised by Lord Wynford (*z*), has been questioned by Lord Eldon (*a*), and apparently with reason. It may be very true, that witnesses are occasionally pressed too much to form a belief (*b*); and some allowance should certainly be made for the over-caution of a scrupulous witness; but though it may be very proper to receive the testimony of a person, who, declining to express a decided belief, will yet declare that he is of *opinion*, or that he *thinks*, the paper is genuine, yet it is going a step further when the witness will only state that the handwriting is like; a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper may have been written by an utter stranger.

§ 1869. Although all proof of handwriting, except when the witness either wrote the document himself, or saw it written, is in its nature comparison;—it being the belief which a witness entertains, upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge (*c*);—the law, until the year 1854, did not allow the witness, or even the jury, except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. This technical rule of the common law was abrogated by the Legislature in the year just named, so far at least as related to trials at Nisi Prius (*d*). In 1865, the Act of 28 & 29 V. c. 18, enacted in section 8, that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute." Section 1 of the same Act provides, that the above enactment,—in common with certain other clauses relating to evidence,—"shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland" (*e*).

§ 1870. Under this statutory law it seems clear, first, that any writings, the genuineness of which is proved to the satisfaction, not

(*y*) *Garrells* v. *Alexander*, (1801) 4 Esp. 37. See, also, *Beauchamp* v. *Cash*, (1822) D. & R. N. P. 3.

(*z*) 2 Ph. Ev. 249, n. 2.

(*a*) *Eagleton* v. *Kingston*, (1803) 8 Ves. 476. See, also, *Cruise* v. *Clancy*, (1844) 6 Ir. Eq. R. 552.

(*b*) *Eagleton* v. *Kingston*, *supra*.

(*c*) *Doe* v. *Suckermore*, (1836) 5 A. & E. 731.

(*d*) 17 & 18 V. c. 125, ss 27, 103 (now repealed).

(*e*) This rule has been adopted by the Committee for Privileges in the House of Lords. *Shrewsbury Peerage*, (1857) 7 H. L. C. 1, 15; 115 R. R. 1.

of the jury, but of the judge (*f*), may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the cause (*g*); and next, that the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting (*h*), or, without the intervention of any witnesses at all, by the jury themselves (*i*), or, in the event of there being no jury, by the court. If, therefore, an action be brought by the indorsee of a bill of exchange against the acceptor, who by his statement of defence has denied the indorsement by the drawer, it seems that the jury may, by simply comparing the indorsement with the drawing, which is conclusively admitted to be genuine (*k*), find a verdict for the plaintiff, even though no witness be called to disprove the defence (*l*).

§ 1871. It further appears, that any person whose handwriting is in dispute, and who is present in court, may be required by the judge to write in his presence, and that such writing may be compared with the document in question (*m*). Moreover, in all cases of comparison of handwriting, the witnesses, the jury, and the court may respectively exercise their judgment on the resemblance or difference of the writings produced, with respect to the general character of the handwriting,—the forms of the letters, and the relative number of diversified forms of each letter,—the use of capitals, abbreviations, stops, and paragraphs,—the mode of effecting erasures, or of inserting interlineations or corrections,—the adoption of peculiar expressions,—the orthography of the words,—the grammatical construction of the sentences,—and the style of the composition,—and also on the fact of one or more of the documents being written in a feigned hand (*n*).

§ 1872. In one respect, the enactment under discussion seems open to objection. If the word "genuine," as applied to a document,

(*f*) See *Egan* v. *Cowan*, (1858) 30 L. T. 223.

(*g*) *Birch* v. *Ridgway*, (1858) 1 F. & F. 270; *Cresswell* v. *Jackson*, (1860) 2 F. & F. 24.

(*h*) See *R.* v. *Rickard*, (1918) 119 L. T. 192; 88 L. J. K. B. 720.

(*i*) *Cobbett* v. *Kilminster*, (1865) 4 F. & F. 490.

(*k*) *Ante*, § 851.

(*l*) See as to the former law, *Allport* v. *Meek*, (1830) 4 C. & P. 267.

(*m*) See *Doe* d. *Devine* v. *Wilson*, (1855) 10 Moore P. C. 502, 530; 110 R. R. 83; *Cobbett* v. *Kilminster*, *supra*. The Ind. Evid. Act, 1872, contains, in section 73, the following enactment:—"The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person."

(*n*) "The Handwriting of Junius professionally investigated by Mr. Charles Chabot, Expert," is the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings. It deserves the most attentive study, and it quite exhausts the subject. See Handw. of Jun. by Twistleton & Chabot, quarto, published by Murray in 1871.

simply means,—and it can scarcely have any other meaning,—that it is in the handwriting of the person by whom it purports to have been written, the Legislature has made no provision for the case of a party who seeks to disprove his signature to a receipt, bill, or other document, by comparing it with papers written by him *post litem motam*. This will open a door to fraud. Many men are capable of writing in several different hands; and, consequently, when the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the jury genuine documents, which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute (*o*).

§ 1874. When *documents* are of such *antiquity* that witnesses who have corresponded with the supposed writer, or who have seen him write, cannot be produced, the law will, from necessity, be satisfied with less strict proof than is required in other cases (*p*). Such documents, when thirty years old, generally prove themselves (*q*); but still occasions may arise when, in order to establish identity, it will become necessary to prove the handwriting. For instance, if in a pedigree cause, or a peerage claim, a declaration, purporting to have been written by a deceased member of the family, be tendered in evidence, the handwriting must be proved in some legal mode, however ancient the paper may be (*r*). How, then, is this to be done? Doubtless, under the Act of 28 & 29 V. c. 18, s. 8 (*s*), the proof may be established by producing from the proper custody other documents admitted to be genuine, or proved to have been respected, treated, and acted upon as such by the parties interested in them, and by then permitting witnesses, whether experts or others, and the court and jury to compare such documents directly with the paper in dispute (*t*).

§ 1875. It is also clear that, without the production of any documents for the purpose of instituting a direct comparison, the hand-

(*o*) Ld. Brougham's Bill of 1853 contained the following clause to avoid this evil :—"Where the handwriting of any person is sought to be *disproved* by comparison with other writings of his, not admissible in evidence for any other purpose in the cause, such writings, before they can be compared with the document in question, must, if sought to be used by the party in whose handwriting they are, be proved to have been written prior to any dispute respecting the genuineness of such document." See *ante*, § 1863, *ad fin.*

(*p*) *Doe v. Suckermore*, (1836) 5 A. & E. 717, 718; 7 L. J. K. B. 33; 44 R. R. 533, per Coleridge, J.

(*q*) *Ante*, §§ 87, 88.

(*r*) *Tracy Peerage*, (1839) 10 Cl. & F. 154; 59 R. R. 59; *Fitzwalter Peerage*, (1843) *id.* 193; 59 R. R. 80; *Morewood* v. *Wood*, (1811) 14 East, 328; 12 R. R. 537; *Taylor* v. *Cook*, (1820) 8 Price, 652.

(*s*) *Ante*, § 1869.

(*t*) This course was allowable to a great extent under the old law. See *Davies* v. *Lowndes*, (1843) 7 Scott, N. R. 168, 169, 209; 12 L. J. Ex. 506; 64 R. R. 783; *Doe* v. *Tarver*, (1824) Ry. & M. 143; *Anon.*, cited *id.*, per Lawrence, J.; *Roe* v. *Rawlings*, (1806) 7 East, 282, n.; 8 R. R. 632; *Morewood* v. *Wood*, *supra*; *Taylor* v. *Cook*, *supra*.

writing under investigation may be proved by any witness, who has become acquainted with it in the ordinary course of his business. This point was decided by the House of Lords on the claim of Sir B. W. Bridges to the barony of Fitzwalter (*u*). There, it became necessary to show that a family pedigree, produced from the proper custody, and purporting to have been made some ninety years before by an ancestor of the claimant, was written by him. To establish this fact, the family solicitor of the claimant was called; and on his stating that he had acquired a knowledge of the ancestor's writing, from having had occasion at different times to examine, in the course of his business, many deeds and other instruments purporting to have been written or signed by him, the Lords considered this witness competent to prove the handwriting of the pedigree. In another case (*v*), where in order to prove a pedigree, it became necessary to rely upon a marriage certificate, which purported to have been written and signed eighty-five years before the trial by W. Davies, the then curate of the parish, the Court of Queen's Bench held that the document was admissible, on proof by the parish clerk, that in the course of his official duty he had acquired a knowledge of the handwriting of Mr. Davies, from various signatures in the original register. It was objected that some witness should have been called to speak to the death of the curate, or to have shown when he died, or at least that some search should have been made for persons who might have seen him write, or have been able to prove his signature in the ordinary way; but the objections were overruled as untenable.

§ 1876. But the question still remains, can a witness, in the cases just put, be called to state that he has acquired a knowledge of the handwriting in question, not from a course of business, like a party's solicitor or steward, but from studying the signatures attached to documents, which are either admitted or proved to be genuine, but which are not produced, for the express purpose of speaking to the identity of the writer? The House of Lords in the Fitzwalter Peerage case (*x*) decided,—in apparent opposition to several older authorities (*y*),—that such testimony was inadmissible, and the practice established by the Common Law Procedure Act, 1854 (*z*), does not seem to have interfered with this decision.

(*u*) *Fitzwalter Peerage*, *supra*. See *Crawford* v. *Lindsay Peerage*, (1848) 2 H. L. C. 556—558; 81 R. R. 269.

(*v*) *Doe* v. *Davies*, (1847) 10 Q. B. 314; 16 L. J. Q. B. 218; 74 R. R. 299.

(*x*) (1843) 10 Cl. & F. 193.

(*y*) See *Sparrow* v. *Farrant*, (1819) 2 St. Ev. 517; n. *e*, per Holroyd, J.; *Doe* v. *Lyne*, (1822) 2 Ph. Ev. 258, n. 1; *Beer* v. *Ward*, (1821) cited *id.*, per Dallas, C.J., and Ld. Tenterden; *Anon.*, (1846) per Ld. Hardwicke, cited B. N. P. 236, *b*; *Doe* v. *Suckermore*, (1836) 5 A. & E. 703; 7 L. J. K. B. 33; 44 R. R. 533.

(*z*) *Ante*, § 1869. See *R.* v. *Rickard*, [1918] 119 L. T. 192; 88 L. J. K. B. 720.

§ 1877. Independently of all cases in which handwriting is sought to be proved by actual comparison, the testimony of skilled witnesses will occasionally be admissible for the purpose of throwing light upon the document in dispute. First, if the writing be ancient, an expert may state his belief as to the probable period at which it was written, because, in such a case, as the character of handwriting varies according to the progress of civilisation, antiquarian knowledge may afford much assistance in arriving at a right conclusion (*a*). Secondly, if the question be whether a paper is written in a feigned or natural hand (*b*), witnesses whose duty it has been to detect forgeries will probably be admissible in this country (*c*), as they certainly are in America (*d*), on the ground that such persons are supposed to be more capable than ordinary men of pronouncing a safe opinion on a subject of this nature (*e*). Still, as experts usually come with a bias on their minds to support the cause in which they are embarked, little weight will in general be attached to the evidence which they give (*f*), unless it be obviously based on sensible reasoning.

§ 1878. Although in ordinary cases, when a witness is called to speak to handwriting, the document itself is produced in court, it is obvious that this course may occasionally be highly inconvenient or even impossible. For instance, suppose it be necessary to identify a person, who has either written a paper which is lost, or has signed a record or public register, the removal of which from its proper place of custody cannot be enforced,—will a witness be allowed to prove such person's handwriting without producing the original document? This point was raised and decided in the affirmative in *Sayer* v. *Glossop* (*g*), where the defendant, having pleaded her coverture, and having put in an examined copy of the register of her marriage with one A. B., was permitted, without producing the original register, to call a witness, who deposed that he knew one A. B., and had often seen him write; and that the husband's signature in the register, which he had examined, was in the handwriting of his friend A. B.

(*a*) *Doe* v. *Suckermore*, *supra*; *Tracy Peerage*, (1839) 10 Cl. & F. 154; 59 R. R. 59.

(*b*) Those who feel an interest in tracing a similarity between feigned and natural handwriting, are referred to the 4th vol. of Ld. Chatham's Corresp., where, at p. 37 of the fac-similes of autographs, they will find a curious comparison of the upright writing of Junius with the running-hand of Sir Ph. Francis. See, also, *ante*, § 1871, n. (*n*).

(*c*) *R.* v. *Coleman*, (1852) 6 Cox C. C. 163.

(*d*) *Hammond's Case*, (1822) 2 Greenl. 33; *Moody* v. *Rowell*, (1835) 17 Pick. 490; *Com.* v. *Carey*, (1823) 2 Pick. 47; *Lyon* v. *Lyman*, (1831) 9 Conn. 55; *Lodge* v. *Phipher*, (1824) 11 Serg. & R. 333.

(*e*) *R.* v. *Cator*, (1802) 4 Esp. 117, 145; *Goodtitle* v. *Braham*, (1792) 4 T. R. 497; *Doe* v. *Suckermore*, *supra*; Fitzwalter Peerage, (1843) 10 Cl. & F. 198; 59 R. R. 316.

(*f*) *Tracy Peerage*, *supra*; *Gurney* v. *Langlands*, (1822) 5 B. & Ald. 330; 24 R. R. 396.

(*g*) (1848) 2 Ex. 409.

§ 1879. To facilitate the reading of documents on trials in the County Courts, a rule provides as follows:—"Where any documents, which would, if duly proved, be admissible in evidence, are produced to the court from proper custody, they shall be read without further proof, if, in the opinion of the court, they appear genuine, and if no objection is taken thereto; and if the admission of any document so produced is objected to, the court may adjourn the hearing for the proof of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the court otherwise orders" (*h*).

§ 1880 (*i*). The admissibility and effect of private writings, when offered in evidence, have been incidentally considered, under various heads, in the preceding pages, so far as they are established and governed by any rules of law. On this subject, therefore, no further comments are necessary.

§ 1881. Still, it may be convenient here to advert to *six practical rules* of some importance, all of which will be found applicable to evidence of every description. *First*, where evidence is offered for a *particular purpose*, and an objection is taken to its admissibility for that purpose, if the judge pronounces in favour of its *admissibility*, the court will support his decision, provided the evidence be admissible for *any purpose* (*k*). The proper course for the opposing counsel to take in such a case would seem to be, to call upon the judge to explain to the jury, that the evidence, though admissible in the cause, furnishes no proof of the particular fact in question; and then, should the judge refuse to make the explanation required, an application might be made to the court above for a new trial on the ground of misdirection (*l*). *Secondly*, where inadmissible evidence is received at the trial *without objection*, the opposite party cannot afterwards object to its having been received (*m*), or obtain a new trial on the ground that the judge did not expressly warn the jury to place no reliance upon it (*n*). But if, in a criminal case, inadmissible evidence of an important character be in fact received, and left to the jury, a conviction is bad, even where there is sufficient other evidence to sustain it (*o*). In a case where inadmissible evidence of an important char-

(*h*) Cy. Ct. R. Order XVIII. r. 9.

(*i*) Gr. Ev. § 583, in part.

(*k*) *Irish Society* v. *Bp. of Derry*, (1845) 12 Cl. & F. 641, 665; 69 R. R. 150.

(*l*) *Id.* 672—674, per Ld. Brougham.

(*m*) *Reed* v. *Lamb*, (1860) 29 L. J. Ex. 452; 6 H. & N. 75; 123 R. R. 392.

(*n*) *Goslin* v. *Corry*, (1844) 7 Man. & G. 342; *Doe* v. *Benjamin*, (1839) 9 A. & E. 644; 8 L. J. Q. B. 117; 48 R. R. 622.

(*o*) *R.* v. *Gibson*, (1887) 18 Q. B. D. 537; 56 L. J. M. C. 49; *R.* v. *Brittleton*, (1884) 12 Q. B. D. 266; 53 L. J. M. C. 83. Objection was taken to the evidence in the latter case, but not in the former.

acter has been admitted which may have influenced the jury to convict the prisoner, the Court of Criminal Appeal will not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (*p*), that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred (*q*). *Thirdly*, where evidence is objected to at the trial, the *nature of the objections* must be distinctly stated, whether an exception be entered on the record or not (*r*); and on moving for a new trial on account of its improper admission, counsel will not be permitted to rely on any other objections than those taken at Nisi Prius (*s*). On appeal to the Court of Appeal, however, from the judgment of a judge alone without a jury the Court of Appeal will decide upon evidence properly admissible only although inadmissible evidence was received at the trial without objection (*t*).

§ 1882. *Fourthly*, where evidence is tendered at the trial on an untenable ground, and is consequently rejected, the court will not

(*p*) 7 Ed. 7, c. 23.

(*q*) *R.* v. *Ellis*, [1910] 2 K. B. 746, 764; 79 L. J. K. B. 841; *R.* v. *Fisher*, [1910] 1 K. B. 149; 79 L. J. K. B. 187; *R.* v. *Rodley*, [1913] 3 K. B., at p. 475; 82 L. J. K. B. 1070. See also *Makin* v. *Att.-Gen. for New South Wales*, [1894] A. C. 57, 69—71; 63 L. J. P. C. 41; and *Ibrahim* v. *Rex*, [1914] A. C. 599; 83 L. J. P. C. 185; and the cases cited at p. 616 of the latter case. In *R.* v. *Sanders*, [1919] 1 K. B. 550; 88 L. J. K. B. 982, the C.C.A. refused to give effect to an objection that inadmissible evidence had been received on the ground that objection had not been properly taken to it at the trial (objection having been made when counsel for the prosecution was opening the case, but not repeated when the evidence was tendered). But the above cases were not cited. The evidence improperly admitted in this case was parol evidence of the contents of letters written to the prisoner, notice to produce which had not been given. The accuracy of the parol evidence was not impugned. In a criminal case when inadmissible evidence is tendered or inadmissible questions of an objectionable character are put, it is the duty of the judge to intervene and not to wait for prisoner's counsel to object. It is frequently practically impossible for prisoner's counsel to object without prejudicing his client—*e.g.*, where the ground of objection is that the evidence or question objected to tends to show that the prisoner has been guilty of other offences : *R.* v. *Ellis*, *supra*. In criminal cases where the argument of an objection raised to the admissibility of evidence or to the propriety of a question cannot be had in the presence of the jury without risk of prejudice to the prisoner, the proper course is for the jury to be sent to their room whilst the matter is being argued in open court. This course is preferable to the judge retiring with counsel and hearing the arguments *in camerâ* : *R.* v. *Thompson*, [1917] 2 K. B. 630; 86 L. J. K. B. 1321.

(*r*) Bills of exceptions were abolished in civil causes by Rules of Supr. Ct., 1875, Ord. LVIII. r. 1. But the same object may be gained "by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record," 38 & 39 V. c. 77, s. 22.

(*s*) *Williams* v. *Wilcox*, (1838) 8 A. & E. 314, 337; 7 L. J. Q. B. 229; 47 R. R. 595; *Ferrand* v. *Milligan*, (1845) 7 Q. B. 730; 15 L. J. Q. B. 103; 68 R. R. 757; *Bain* v. *Whitehaven and Furness Junction Ry.*, (1850) 3 H. L. C. 1, 15—17; 88 R. R. 1.

(*t*) *Jacker* v. *International Cable Co., Lim.*, (1888) 5 Times L. R. 13. As to appeals from County Courts, it is essential that objection to the admissibility of the evidence should have been taken before the County Court judge : *Formby* v. *Formby*, [1910] 102 L. T. 116; 54 Sol. J. 269.

grant a new trial merely because it has since been discovered that the evidence was admissible on another ground; but the party must go much further, and show, first, that he could not by due diligence have offered the evidence on the proper ground at the trial, and next, that manifest injustice will ensue from its rejection. His position, at the best, is that of a party who has discovered fresh evidence since the trial (*u*). *Fifthly*, where evidence is rejected at the trial, the party proposing it should *formally tender* it to the judge, and request him to make a note of the fact. If this has not been done, and the judge has no note on the subject, the counsel cannot afterwards complain of the rejection of the evidence (*v*). If the witness whose evidence at the trial has been rejected become dangerously ill during the pendency of the appeal, the Court of Appeal has power to order his evidence to be taken *de bene esse* by a special commissioner (*x*). *Lastly*, though evidence has been improperly admitted or rejected at Nisi Prius, or the judge has omitted to put to the jury a question which he was not asked to leave to them, the court will not grant a new trial, unless in its opinion "some substantial wrong or miscarriage has been thereby occasioned; and if it appears to the Court of Appeal that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties" (*y*). Another rule provides:—"On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought, shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection or improper reception or rejection of evidence, unless, in the opinion of the Court, substantial wrong or miscarriage has been thereby occasioned in the Court below" (*z*).

§ 1883. Besides these rules which apply principally to trials by jury, it must be borne in mind that the Court of Appeal is now clothed,

(*u*) *Doe* v. *Beviss*, (1849) 7 C. B. 456.

(*v*) *Gibbs* v. *Pike*, (1842) 9 M. & W. 351, 360, 361; *Whitehouse* v. *Hemmant*, (1858) 27 L. J. Ex. 295; *Penn* v. *Bibby*, (1867) L. R. 2 Ch. 127.

(*x*) *Sol. to the Treasury* v. *White*, (1886) 55 L. J. P. 79.

(*y*) R.S.C., 1883, Ord. XXXIX. r. 6. The Scotch law on this subject is embodied in section 45 of 13 & 14 V. c. 36, which enacts, that "a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived." See *Hodson* v. *Mid-Great W. Ry.*, (1877) I. R. 11 C. L. 109.

(*z*) Ord. LIX. r. 7.

by the Rules of the Supreme Court, 1883, with large powers for amending proceedings, and for receiving further evidence. These objects are attained by Order LVIII., Rule 4, which provides, that "the Court of Appeal shall have all the powers and duties as to amendments and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court." Order 58, r. 4, applies to appeals to the Court of Criminal appeal, which court accordingly in its discretion has power to receive further evidence in the same manner as in civil cases (*a*).

§ 1884. The words "further evidence" mean any evidence not used at the trial or hearing in the court below. Provided it has not been so used, it falls within the rule, whether it be evidence altogether fresh, or evidence which has already been used in the same cause, or in any other cause between the same parties, and which might have been read at the trial had notice been given (*b*). The court will not grant permission to admit further evidence as a mere matter of course, but will act cautiously in the matter, and will generally require some strong reason to be given for invoking its interference (*c*). It will also, of course, be more ready to admit documentary evidence than oral testimony after the pinch of the case has been sustained (*d*); but still, it will be reluctant at any time to shut out any witness, who will probably be able to throw some genuine light upon the matter (*e*): and it will grant the application all the more readily, if there be any ground for assuming that the court below has been deceived or otherwise misled by the testimony given (*f*).

§ 1884A. When an appellant wishes to adduce further evidence upon the hearing of an appeal, and that evidence consists of an affidavit

(*a*) *R.* v. *Robinson*, [1917] 2 K. B. 108; 86 L. J. K. B. 773.
(*b*) *In re Chennell*, *Jones* v. *Chennell*, (1877) 8 Ch. D. 492, 505; 47 L. J. Ch. 583.
(*c*) *Id.*; *In re Weston's Case*, (1879) 10 Ch. D. 579; 48 L. J. Ch. 425.
(*d*) *In re Coal Economising Gas Co.*, *ex parte Gover*, (1876) 1 Ch. D. 182; 45 L. J. Ch. 95; *In re Weston's Case*, *supra*.
(*e*) *Id.*
(*f*) *Bigsby* v. *Dickinson*, (1877) 4 Ch. D. 24; 46 L. J. Ch. 280.

or other document (*g*), he may, without any recourse to the court for leave, give notice to the respondent of his intention to apply at the hearing for permission to take such step (*h*), but if the party wishes to examine a fresh witness, he must apply for leave by motion before the hearing (*i*).

§ 1884B. When an appeal is brought from the finding of a jury on a question of fact it is not the province of the Court of Appeal to retry the question. The verdict must stand if it is one which the jury as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the judge who tried the case and the Court of Appeal (*k*). When, however, a case has been tried alone by a judge, without a jury, the appeal to the Court of Appeal is not governed by the rules applicable to applications for new trials after a trial and verdict by a jury, but amounts to a rehearing of the case; and although the appeal turns on a question of fact, the Court of Appeal reconsiders the materials before the judge, with such other materials as it may have decided to admit, and then makes up its own mind on the merits, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong (*l*). The Court will, however, start with the presumption that the decision of the judge on the facts was right, and in a doubtful case the judgment of the court below on the facts is entitled to great weight (*m*).

§ 1884C. A new trial may sometimes be obtained on the ground of the discovery of fresh evidence after the hearing, but it being in the public interest that there should be an end to litigation after the facts have been properly gone into, the right to a new trial on this ground is subject to considerable limitations and will only be granted in exceptional cases. Therefore, the party applying must satisfy the court that the new evidence could not have been by reasonable dili-

(*g*) See *Dicks* v. *Brooks*, (1880) 15 Ch. D. 22; 49 L. J. Ch. 812; explaining *Hastie* v. *Hastie*, (1876) 1 Ch. D. 562; 45 L. J. Ch. 288.

(*h*) *Hastie* v. *Hastie*, *supra*; *Justice* v. *Mersey Steel Co.*, (1875) 24 W. R. 199. See, as to the practice in *Ireland*, *Long v. Donegan*, (1873) Ir. R. 7 Eq. 494.

(*i*) *Dicks* v. *Brooks*, *supra*.

(*k*) *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72; 74 L. J. P. C. 30; *Metropolitan Railway Co.* v. *Wright*, (1886) 11 App. Cas. 152; 55 L. J. Q. B. 401.

(*l*) *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; 67 L. J. Ch. 402; *Re Wagstaff*; *Wagstaff* v. *Jalland*, [1908] 98 L. T. 149.

(*m*) *Colonial Securities Co.* v. *Massey*, [1896] 1 Q. B. 38; 65 L. J. Q. B. 100; and see *The Glannibanta*, (1876) 1 P. D. 283; *Bigsby* v. *Dickinson*, (1877) 4 Ch. D. 24; 46 L. J. Ch. 280; and the remarks of the Earl of Halsbury, L.C., in *Montgomerie* v. *Wallace-James*, [1904] A. C. 75; 73 L. J. P. C. 25, on the duties of an appellate court rehearing a question of fact.

gence obtained before the hearing, and is such that if admitted would be practically conclusive to determine the trial the other way (*n*).

§ 1884d. The omission of the defendant in a jury action to ask the judge at the trial to nonsuit the plaintiff or to direct a verdict for the defendant on the ground that there was *no evidence* upon which the jury could reasonably find for the plaintiff does not preclude the Court of Appeal, on a motion for a new trial, from entertaining the question of no evidence, and in a proper case the Court, under Ord. 58, r. 4, may order judgment to be entered for the defendant on that ground, notwithstanding such omission (*o*).

§ 1885 (*p*). Having now completed the design of this Treatise, in presenting a general view of the principles and rules of the Law of Evidence, the work is here properly brought to a close. The student will not fail to observe the symmetry and beauty of this branch of the law, under whatever disadvantages it may labour from the manner of treatment: and will rise from the study of its principles, convinced, with Lord Erskine, that, with some few exceptions (*q*), "they are founded in the charities of religion,—in the philosophy of nature,—in the truths of history,—and in the experience of common life" (*r*).

(*n*) *Young* v. *Kershaw*, (1899) 81 L. T. 531. See, also, *Anderson* v. *Titmas*, (1877) 36 L. T. 711; *Taylor* v. *Taylor*, (1899) 81 L. T. 494; 68 L. J. P. 116; *Warham* v. *Selfridge*, [1914] 30 Times L. R. 345; *Robinson* v. *Smith*, [1915] 1 K. B. 711; 84 L. J. K. B. 783; *The Olympia* and *H.M.S. Hawke*, [1913] P. 214; 83 L. J. P. 113, more fully reported on this point, 28 Times L. R. 319; *R.* v. *Mortimer*, [1908] 24 Times L. R. 745; *Isaacs* v. *Hobhouse*, [1919] 1 K. B. 398; 88 L. J. K. B. 668.

(*o*) *Banbury* v. *Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158.

(*p*) Gr. Ev. § 584, in great part.

(*q*) See Index, tit. "Suggestions for amending the Law of Evidence."

(*r*) 23 How. St. Tr. 966.

APPENDIX.

The use of Interrogatories at the Trial.

It is not considered necessary to deal with the various Rules of the Supreme Court under which interrogatories may be administered to parties to an action, as this is a matter which is more appropriate to a work on practice than to one on evidence. It is sufficient to say that the rules of Order 31 of the Rules of the Supreme Court contain the law on the subject, and reference should be made to one of the practice books for full information. It may not be out of place, however, to refer briefly to the way in which interrogatories can be used at a trial.

Rule 24 of Order 31 provides: "Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or any part of an answer of the opposite party (*a*) to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last mentioned answers ought not to be used without them, he may direct them to be put in."

In *Lyell* v. *Kennedy* (*b*), Lord Justice Cotton said: "I think no judge would allow a defendant where he had made an admission, to read with it a passage which was not connected in sense or substance with that admission, even if he had put in a statement submitting that he was entitled to do so, and claiming to do so. Of course, when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted."

(*a*) As to the meaning of the expression "opposite party," see *Eden* v. *Weardale Iron and Coal Company*, (1887) 35 Ch. D. 287, where Cotton, J., said that there was "no magic" in these words: "It was merely intended to use these words so as, without great verbiage and length of language, to enable a plaintiff to interrogate a defendant, and a defendant to interrogate a plaintiff, but the words of definition of "plaintiff" and "defendant" in the 100th section of the Judicature Act are so wide as to include all persons who litigate one against the other in any proceeding any question which the Court may properly decide."

(*b*) (1884) 27 Ch. D. 1, at p. 15.

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The Eastern Press, Limited, London and Reading.